
CLERKS OF COURT

by
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TOPIC SCOPE

Scope of Topic:

This article discusses the nature of the office of clerk of court, the appointment, qualification, and tenure of clerks of court, their compensation, and their powers, duties, and liabilities.

Treated Elsewhere:

are matters relating to public officers generally (see 63 AmJur 2d, Public Officers and Employees), the authority of court over their own records (see 20 Am Jur 2d, Courts ; 66 Am Jur 2d, Records and Recording Laws), and matters incident to the performance of certain specific duties of clerks (see 8 Am Jur 2d, Bail and Recognizance ; 23 Am Jur 2d, Deposits in Court ; 46 and 47 Am Jur 2d, Judgments ; 58 Am Jur 2d, Oath and Affirmation ; 62 Am Jur 2d, Process ; 74 Am Jur 2d, Tender).

I. GENERALLY

§ 1 Nature of office

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A clerk of a court of justice is essentially a ministerial officer of the court, 1 who has charge of the clerical part of its business. 2 A clerk of court is also sometimes called a "prothonotary." 3 Sometimes described as an "administrative officer" 4 or as the mere "arm" 5 or "hand" of the court, 6 the clerk is its official scribe, 7 an "assistant" whose principal duty is to make a correct memorial of the court proceedings. 8 He has custody of the court's records and seals, with power to certify to the correctness of transcripts from such records, and possesses authority to perform certain acts of a judicial nature incidental to his ministerial duties. 9

Under some constitutional or statutory provisions, a judge must also fill the office of clerk of court. 10 The duties of an ordinary may be of a dual nature where he not only acts as a judge of the court of ordinary but also as the clerk of that court. 11 One who exercises the dual function of clerk and master of the chancery court serves in both a ministerial and a judicial character. 12

While the clerk of court is not a judicial officer, 13 he is part of the judicial branch of the government. 14 Thus, in the performance of his ministerial duties, the clerk is subject to the control of the court. 15 However, the court cannot, merely by reason of the general relation which exists between the court and its clerk, supervise or control actions of the clerk taken pursuant to a statute giving a clerk of court personal authority which he may exercise according to his own judgment and responsibility. 16 It has also been said that the legislature may properly order the clerk of the Supreme Court to perform specific ministerial functions in the interests of orderly government, but in the performance of his duties so far as they appertain to the exercise of his judicial power, the clerk of court is completely under the control and direction of the court, and it is unconstitutional for the legislature to attempt to regulate or control his obligations of a judicial nature. 17

§ 1 ----Nature of office [SUPPLEMENT]

Case authorities:

County clerk was acting as state officer in performance of her duties as Clerk of Supreme Court when, in response to Supreme Court's order expunging judgment against one of 2 joint debtors, she erroneously entered notation on docket expunging judgment against both debtors; thus, Court of Claims properly denied state's motion to dismiss judgment creditor's claim against it, alleging that county clerk negligently expunged judgment from county records, based on state's contention that clerk was not state official and was not acting on state's behalf. *Haskins v State* (1988, 4th Dept) 145 App Div 2d 915, 535 NYS2d 852.

Footnotes

Footnote 1. *Ex Parte Hart*, 240 Ala 642, 200 So 783; *Royston v Pima County*, 106 Ariz 249, 475 P2d 233; *Book v Ewbank*, 311 Ill App 312, 35 NE2d 961; *Hargis v Bach*, 291 Ky 766, 165 SW2d 565; *Boston v Santosuosso*, 308 Mass 202, 31 NE2d 572; *State ex rel. Wanamaker v Miller*, 164 Ohio St 174, 57 Ohio Ops 151, 128 NE2d 108.

In *United States Fidelity & Guaranty Co. v State*, 65 Ariz 212, 177 P2d 823, the clerk is characterized as one whose duties are not purely ministerial, but rather an integral part of the whole judicial process; as an officer of the court, he is endowed with certain judicial authority to aid and promote the judicial process. In this capacity, authority may properly be vested in him under a supreme court rule to enter judgment on bond against defendant and his surety 10 days after entry of a superior court order forfeiting the bail bond of defendant in a criminal case, on the county attorney's filing of a certified copy of the order of forfeiture and requesting docketing and entry of judgment.

Footnote 2. *People ex rel. Vanderburg v Brady*, 275 Ill 261, 114 NE 25; *State ex rel. St. Louis v Priest*, 348 Mo 37, 152 SW2d 109.

In time past the custody of court records was entrusted to one of the judges, "custos rotulorum." The word "clerk" at root denoted a member of the clergy, and the time was when the law and the gospel flowed from the same hand. However, in progress of time, clerks and judges became sharply differentiated. The manifest impossibility of a judge's having charge of and writing the records and issuing writs became apparent, and the

office of clerk of courts was created. *State ex rel. Henson v Sheppard*, 192 Mo 497, 91 SW 477.

Footnote 3. *Lennox v Clark*, 372 Pa 355, 93 A2d 834.

The chief clerk or register of a court is sometimes called a "prothonotary." *Werner v Hillman Coal & Coke Co.*, 300 Pa 256, 150 A 471, 70 ALR 967.

Footnote 4. *State ex rel. St. Louis v Priest*, 348 Mo 37, 152 SW2d 109.

Footnote 5. *Cannon v Nikles*, 235 Mo App 1094, 151 SW2d 472; *Watson v Odell*, 53 Utah 96, 176 P 619.

Footnote 6. *Kansas City Pump Co. v Jones*, 126 Mo App 536, 104 SW 1136.

Footnote 7. *McClerkin v State*, 20 Fla 879.

Footnote 8. *Wilson v Los Angeles County Employees Asso.*, 127 Cal App 2d 285, 273 P2d 824.

Footnote 9. A clerk of court is an officer of the court who has charge of its clerical business and keeps its records and seal, issues process, enters judgments and orders, makes certified copies from the record, etc. He belongs to the judicial department of the government. *People ex rel. Vanderburg v Brady*, 275 Ill 261, 114 NE 25.

A clerk of court is a person employed in a public office of the court whose duty it is to keep the records or accounts of the court. *Jones v Reed*, 58 Ga App 72, 197 SE 665.

The duties of clerks of court are in general to serve the court in a ministerial capacity, to act as custodian of its records, and to perform such duties as are prescribed by law or imposed by the lawful authority of the court. *Union Bank & Trust Co. v County of Los Angeles*, 2 Cal App 2d 600, 38 P2d 442 (ovrld on other grounds *Minsky v Los Angeles*, 11 Cal 3d 113, 113 Cal Rptr 102, 520 P2d 726).

For specific discussion of these powers and duties, see §§ 21 et seq., *infra*.

Footnote 10. *State ex rel. Garrett v Torbett*, 200 Ala 663, 77 So 37; *State ex rel. Reese v Mooney*, 64 ND 620, 255 NW 105.

Under some laws, a justice of the peace acts as his own clerk. *Ex Parte Sheehan*, 100 Mont 244, 49 P2d 438.

Footnote 11. *State v Henderson*, 120 Ga 780, 48 SE 334.

Footnote 12. It may be conceded that as a mere clerk the duties discharged by the clerk and master of the chancery court are ministerial in character, but as master in chancery he is the right arm of the chancellor, and acts performed by him in this capacity are those of a judicial officer. *Morrow v Sneed*, 121 Tenn 173, 114 SW 201.

Office and functions of master in chancery generally, see 27 Am Jur 2d, Equity § 225.

Footnote 13. *Burton v Mayer*, 274 Ky 245, 118 SW2d 161; *C. N. Nelson Lumber Co. v*

McKinnon, 61 Minn 219, 63 NW 630.

Footnote 14. Royston v Pima County, 106 Ariz 249, 475 P2d 233; Olmsted v Meahl, 219 NY 270, 114 NE 393.

Footnote 15. State ex rel. Caldwell v Cockrell, 280 Mo 269, 217 SW 524; State ex rel. Tolls v Tolls, 160 Or 317, 85 P2d 366, 119 ALR 1370 (ovrld on other grounds Burnett v Hatch, 200 Or 291, 266 P2d 414).

Footnote 16. Elliott v Lessee of Peirsol, 26 US 328, 7 L Ed 164.

The legislature may direct the clerk of a court to perform a specified service without making his act the act of the court. Custiss v Georgetown & Alexandria Turnpike Co., 10 US 233, 3 L Ed 209.

Footnote 17. McCabe v Kane, 101 RI 119, 221 A2d 103.

The basic work of the clerk is to participate in the judicial function, to the end that effect may be given to the court's determination through the doing of things judicial in character, as for example, the issuance of process or the entry of orders. Such duties constitute the essential function of the office and under the concept of the separation of powers clearly are matters beyond the control and direction of the legislature. McCabe v Kane, *supra*.

II. APPOINTMENT OR ELECTION; QUALIFICATION

§ 2 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The appointment or election of clerks of courts is generally controlled by constitutional and statutory provisions. 18 In the absence of any constitutional limitation, or where a constitutional provision authorizes legislative control of the appointing power, the legislature may properly regulate the subject; 19 but where the constitution provides the manner of selection of clerks and prescribes their duties, the legislature cannot prescribe a different mode of appointment. 20 Where the office of clerk of court is created by the constitution, he is a constitutional officer. 21

The constitutional authority of Congress to vest the appointment of inferior officers as it thinks proper 22 has been exercised, with respect to clerks of federal courts, by vesting the power of appointing them in the respective federal courts. 23

§ 2 ----Generally [SUPPLEMENT]

Statutes:

28 USCS § 792 was repealed in 1982 by PL 97-164.

Case authorities:

Although Chief Administrative Judge of Unified Court System improperly classified newly created title of deputy chief clerk (arraignments part) as "exempt/confidential," trial court exceeded authority in directing reclassification of position as "noncompetitive" since any remedial action was required to be taken by Chief Administrative Judge, to whom power to adopt and revise classifications was exclusively delegated. *Murphy v Rosenblatt* (1989, 1st Dept) 153 AD2d 524, 544 NYS2d 602, app den 75 NY2d 702, 551 NYS2d 905, 551 NE2d 106.

Footnotes

Footnote 18. *Advisory Opinion to Governor (Fla)* 42 So 2d 170; *State ex rel. Hart v St. Louis*, 356 Mo 820, 204 SW2d 234; *Matney v King*, 20 Okla 22, 93 P 737; *Slater v Varney*, 136 W Va 406, 68 SE2d 757, adhered to 136 W Va 436, 70 SE2d 477.

Footnote 19. *Buzbee v Hutton*, 186 Ark 134, 52 SW2d 647; *Hodge v State*, 135 Tenn 525, 188 SW 203.

Footnote 20. *State ex rel. Abel v Berg*, 132 Minn 426, 157 NW 652; *Warner v People*, (NY) 2 Denio 272.

Footnote 21. *Hilton v Amburgey*, 198 Va 727, 96 SE2d 151.

Footnote 22. US Const Art 2 § 2 cl 2.

Footnote 23. *Ex parte Hennen*, 38 US 230, 10 L Ed 138, referring to the enactment originally empowering the Supreme Court and federal district courts to appoint the clerks of their respective courts.

Statutory authority for appointment by the various federal courts will be found in 28 USCS § 671(a) (clerk of United States Supreme Court); 28 USCS § 711(a) (Courts of Appeals); 28 USCS § 751(a) (District Courts); 28 USCS § 791 (Court of Claims); 28 USCS § 831 (Court of Custom and Patent Appeals); 28 USCS § 871 (Customs Court).

§ 3 Eligibility

<p>View Entire Section Go to Parallel Reference Table</p>

Eligibility to the office of clerk of court is governed largely by constitutional and statutory provisions, and ordinarily is determined as of the time of commencement of the

term of office, not the time of election. 24 It is usually required that the clerk be a citizen of the United States and reside within the jurisdiction of the particular court. 25 Eligibility to the office belongs to all persons not excluded by the constitution, and arbitrary exclusions from the right to the office cannot be established by the legislature. 26

The eligibility of a woman to hold the office of clerk of court, in the absence of express statutory or constitutional provision, is determined by the local law governing eligibility of women to hold public office. 27 If, under the local laws, women are eligible to hold public ministerial offices generally, and there is no express constitutional or statutory provision requiring the clerk to be a male, women are eligible to that office though the word "his" may be used in the statutes referring to the qualification of clerks of court. 28

Footnotes

Footnote 24. *Kirkpatrick v Brownfield*, 97 Ky 558, 31 SW 137.

Footnote 25. *State ex rel. Crow v Hostetter*, 137 Mo 636, 39 SW 270.

A clerk of a federal district court is required to reside in the district for which he is appointed, except that the clerk of the District Court for the District of Columbia and of that for the Southern District of New York may reside within 20 miles thereof. 28 USCS § 751(c).

Footnote 26. *Barker v People* (NY) 3 Cow 686.

Footnote 27. See 63 Am Jur 2d, Public Officers and Employees § 57.

Footnote 28. *State ex rel. Crow v Hostetter*, 137 Mo 636, 39 SW 270.

§ 4 Qualification

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The procedure for qualification of clerks of courts is ordinarily fixed by statute and rules of court. The taking of an oath of office 29 and the giving of an official bond 30 are usual requirements. A clerk is not duly qualified until the oath is taken, but formal qualification is not essential to the official capacity of a legally appointed or elected clerk. If duly appointed or elected, but not having qualified, a clerk is held an officer de facto, and his official acts in that capacity are valid as affecting third parties. 31

As is true of all federal employees, bonds are no longer required of clerks of federal courts in connection with the performance of their official duties, and the Federal Government has assumed all risks of fidelity losses, without, however, affecting the personal liability of such employees to the Federal Government. 32 The form of oath to

be taken by clerks of federal courts is prescribed by statute. 33

§ 4 ----Qualification [SUPPLEMENT]

Statutes:

31 USCS §§ 1201-1204 were repealed by PL 97-258 in 1982, the provisions of former 31 USCS § 1201, concerning the prohibition against surety bonds for United States government personnel, now appear as 31 USCS § 9302. The provisions of former 31 USCS § 1202, concerning adjusting accounts for loss to the United States now appear as 31 USCS § 3530.

Footnotes

Footnote 29. *Farmers & Merchants' Bank v Chester*, 25 Tenn 458; *Slater v Varney*, 136 W Va 406, 68 SE2d 757, adhered to 136 W Va 436, 70 SE2d 477.

Footnote 30. *Sullivan v People*, 16 Colo App 303, 64 P 1049; *Hennessy v Stewart* (Ky) 283 SW2d 719; *American Surety Co. v Commonwealth*, 180 Va 97, 21 SE2d 748.

Actions on bonds, and their validity, see § 36, *infra*.

Footnote 31. *Cocke v Halsey*, 41 US 71, 10 L Ed 891; *Farmers & Merchants' Bank v Chester*, 25 Tenn 458.

De facto clerks, see § 6, *infra*.

Footnote 32. 31 USCS §§ 1201-1204.

Footnote 33. 28 USCS § 951.

§ 5 Title to office

<p style="text-align: center;">View Entire Section Go to Parallel Reference Table</p>

Under the general principle that courts of equity will not determine disputed questions of title to public office, 34 a claimant to the office of clerk of court, out of possession, must seek statutory relief or a remedy by proceedings in the nature of quo warranto 35 or mandamus. 36 The title to the office of clerk of court cannot be assailed collaterally. 37 Where the right of a clerk to act is derived not from the statutes of the state but from the charter of a city and the state constitution, the repeal of statutory provisions on the subject does not impair his right to the office. 38 However, a person appointed "acting clerk" of a particular court has no right or title to the office of clerk of such court. 39

Where a particular court is divided into departments and each department is a separate

court, the clerk of each department is the clerk of that court. 40

Footnotes

Footnote 34. See 63 Am Jur 2d, Public Officers and Employees §§ 139, 140.

Footnote 35. Rhodes v Driver, 69 Ark 606, 65 SW 106; Matney v King, 20 Okla 22, 93 P 737.

See 65 Am Jur 2d, Quo Warranto §§ 18 et seq.

Practice Aids: –Form of complaint or information to oust clerk of court as usurper. 21 Am Jur Pl & Pr Forms (Rev Ed), Quo Warranto, Form 44.

Footnote 36. Dew v Judges of Sweet Springs Dist. Court, 13 Va 1.

See 52 Am Jur 2d, Mandamus §§ 274 et seq.

Footnote 37. Wilson v Lee, 196 La 271, 199 So 117.

Footnote 38. Warner v People (NY) 2 Denio 272.

Footnote 39. Murphy v Cuddy, 121 NJL 209, 1 A2d 758.

Footnote 40. Union Bank & Trust Co. v County of Los Angeles, 2 Cal App 2d 600, 38 P2d 442 (ovrld on other grounds Minsky v Los Angeles, 11 Cal 3d 113, 113 Cal Rptr 102, 520 P2d 726).

§ 6 De facto clerks

[View Entire Section](#)
[Go to Parallel Reference Table](#)

One who exercises the functions of the office of clerk of court under an informal or defective appointment is a de facto officer. 41 The principle that the official acts of officers de facto are, as to third persons, of equal authority with those of officers de jure and cannot be collaterally attacked 42 is applied in cases questioning the validity of acts of de facto clerks of court. 43 Where the official act of the de facto officer is for his own benefit, however, the rule of equal validity does not hold; such an officer may not take advantage of his own want of title, of which he must be cognizant, but of which the public are presumed to be ignorant. 44 In order for there to be a de facto clerk, there must be the de jure office of clerk, and if by a proper exercise of power such office has been declared not to exist or has been abolished, there can be neither a de jure nor a de facto clerk. 45 It is said that an office de facto cannot exist under a written constitution or under a constitutional government, although it may when that government is subverted and a de facto government is in existence. 46 This doctrine, however, is neither uncontroverted nor without exception, particularly with regard to municipal offices.

Certainly where the court itself is a de facto court, its clerk, like the rest of its officials, is, as to such court, a de facto officer. 47

A de jure clerk may be appointed by a de facto judge. 48

Footnotes

Footnote 41. McKenna v Nichols, 295 Ky 778, 175 SW2d 121.

Footnote 42. See 63 Am Jur 2d, Public Officers and Employees § 493.

Footnote 43. Wilson v Lee, 196 La 271, 199 So 117; State ex rel. Dalton v Mouser, 365 Mo 565, 284 SW2d 473; English v Brigman, 225 NC 402, 35 SE2d 173; Stockton v Murray, 25 Tenn App 371, 157 SW2d 859.

Footnote 44. Ward v State, 42 Tenn 605.

Acts performed by clerk after term as those of de facto clerk, see § 8, *infra*. De facto clerk's right to compensation, see § 11, *infra*.

Footnote 45. Hawver v Seldenridge, 2 W Va 274.

Footnote 46. Hildreth's Heirs v M'Intire's Devisee, 24 Ky 206; Hawver v Seldenridge, 2 W Va 274.

Footnote 47. State ex rel. Bales v Bailey, 106 Minn 138, 118 NW 676, holding that even if a municipal court was defectively organized, it was at least a de facto court, the organization being authorized at law, and judge and clerk were de facto officers.

Footnote 48. People ex rel. Norfleet v Staton, 73 NC 546.

III. TENURE AND REMOVAL

§ 7 Term of office

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The term of office of a clerk of court is usually fixed by constitutional provision or by statute. 49 If the legislature has the power to create the office of clerk under constitutional provisions, it also has the power to prescribe the manner of filling the office, its tenure, and all other provisions necessary to make the organization of the court complete and effective. 50 Where the tenure is not fixed by law, the term continues during the pleasure of the appointing power. 51

Statutes fixing the term of office of a clerk of court must not violate constitutional provisions, and if the term is fixed by the constitution, the legislature has no power to vary it. 52

The resignation of a judge does not arrest ministerial proceedings of his clerk, who may continue to perform clerical duties until a successor is selected. 53 Likewise, where a clerk is properly appointed to a de jure office by a de facto judge exercising judicial functions, the subsequent ouster of the judge will not oust his appointee, who can hold office against the appointee of the judge de jure until an election can be regularly held. 54

Footnotes

Footnote 49. *Buzbee v Hutton*, 186 Ark 134, 52 SW2d 647; *Enmeier v Blaize*, 203 Ind 475, 181 NE 1; *Gorham v Robinson*, 57 RI 1, 186 A 832.

Term of public officers generally, see 63 Am Jur 2d, *Public Officers and Employees* §§ 145-156.

Footnote 50. *Buzbee v Hutton*, 186 Ark 134, 52 SW2d 647.

Footnote 51. *Cappon v Cleere*, 177 Misc 1027, 32 NYS2d 845.

Footnote 52. *Cannon v Sligh*, 170 SC 45, 169 SE 712.

Footnote 53. *Application of Rosenblum*, 130 NJL 344, 32 A2d 837.

Footnote 54. *People ex rel. Norfleet v Staton*, 73 NC 546.

Clerk acting after expiration of term as de facto clerk, see § 8, *infra*.

§ 8 Vacancy; holding over

[View Entire Section](#)
[Go to Parallel Reference Table](#)

When no method of filling a vacancy in the office of clerk of court is designated by constitutional provision, the omission may be supplied by legislation, 55 and the vacancy must be filled in the manner thus prescribed. 56 A statute may properly authorize the court to appoint a clerk pro tempore to perform the duties of the office until the vacancy can be filled by election or other manner prescribed by law. 57 A clerk pro tempore may also be appointed on the disqualification of the regular clerk when he is a party to a proceeding, 58 or pending a prosecution against him on a criminal charge not connected with his office, 59 or when he is absent, unable or unwilling to attend to his duties and has no deputy. 60

A vacancy exists in the office of clerk of court when it has no lawful incumbent. 61 Such a vacancy is created by the clerk's death, 62 by his resignation or removal, 63 by

his refusal to act, 64 or by the failure to elect a successor after expiration of the incumbent's term. 65 Moreover, the failure of an elected clerk of court to give the required bond may forfeit the office and create a vacancy. 66 Suspension of the clerk of court from office creates a vacancy which may be filled by the appointment of a clerk for the period of the suspension. 67 A vacancy may also result from the clerk's acceptance of another office. 68 The induction of a clerk into military service has been held not to create a vacancy in the office under a statute relating to the clerk's death, resignation, refusal to act, "or otherwise." 69

Where the time of the commencement and termination of the office of clerk of court, as well as its duration, are definitely fixed by constitutional or statutory enactment, and provision is made for filling vacancies therein by appointment or election, but without any provision as to the duration or authority of the person so appointed or elected, such person is entitled to serve for the remainder of the unexpired term. 70 Accordingly, in such case, the appointing power has no authority to appoint a clerk of court for an interim period less than the period of the vacancy. 71

The temporary failure of one appointed to fill a vacancy in the office of clerk of court to secure his commission does not result in a forfeiture of the office. 72

Under some statutes an incumbent of the office of clerk of court is entitled to hold over or continue in office after the expiration of his term until his successor qualifies, 73 but one appointed to act as clerk on the incumbent's death until such time as the vacancy shall be lawfully filled is not an incumbent within the meaning of a provision of this type. 74 Under constitutional provisions in some jurisdictions terminating a clerk's powers on expiration of his term of office, he is not entitled to hold over. 75 However, a clerk acting as such after the expiration of his term according to the statute under which he was appointed has been held to be a clerk de facto, and his acts will be valid, as those of a de facto clerk. 76

Footnotes

Footnote 55. State ex rel. Dalton v Mouser, 365 Mo 565, 284 SW2d 473; Cannon v Sligh, 170 SC 45, 169 SE 712.

Footnote 56. Foster v Brown, 199 Ga 444, 34 SE2d 530; Rodwell v Rowland, 137 NC 617, 50 SE 319.

Footnote 57. State ex rel. Ellis v Givens, 48 Fla 165, 37 So 308; Boyer v Thurston, 247 Md 279, 231 A2d 50; White v Murray, 126 NC 153, 35 SE 256; Casey v Willey, 89 RI 87, 151 A2d 369.

Footnote 58. Goodman v Schwind (Tex Civ App) 186 SW 282, revd on other grounds (Tex Com App) 221 SW 579.

Footnote 59. State ex rel. Henson v Sheppard, 191 Mo 497, 91 SW 477.

Footnote 60. Hendricks v Huffmeyer (Tex Civ App) 27 SW 777.

Footnote 61. State ex rel. Heffelfinger v Brown, 144 Iowa 739, 123 NW 779.

Footnote 62. State ex rel. Dalton v Mouser, 365 Mo 565, 284 SW2d 473; State ex rel. Kopp v Blackburn, 132 Ohio St 421, 8 Ohio Ops 252, 8 NE2d 434.

Footnote 63. Board of Chosen Freeholders v Lee, 76 NJL 327, 70 A 925, affd 77 NJL 799, 76 A 1118.

Where a clerk was suspended and a temporary clerk appointed under a statutory provision that any court of record may suspend its clerk for charged misdemeanors in office and appoint a temporary clerk who "shall continue in office until the regular clerk shall resume his office, or a successor shall be elected," the resignation of the clerk thus suspended did not create a vacancy to be filled by appointment under a statute relating to vacancy by reason of the clerk's "death, resignation, removal, refusal to act, or otherwise." State ex rel. Sanders v Blakemore, 104 Mo 340, 15 SW 960.

Footnote 64. State ex rel. Dalton v Mouser, 365 Mo 565, 284 SW2d 473.

Footnote 65. State ex rel. Jones v Foster, 39 Mont 583, 104 P 860.

Footnote 66. State v Hargis, 179 La 623, 154 So 628.

Footnote 67. State ex rel. Henson v Sheppard, 192 Mo 497, 91 SW 477; Smith v State, 13 Okla Crim 619, 166 P 463.

Footnote 68. § 9, *infra*.

Footnote 69. State ex rel. McKittrick v Wilson, 350 Mo 486, 166 SW2d 499, 143 ALR 1465.

Annotation: 143 ALR 1470, s. 147 ALR 1427, 148 ALR 1400, 150 ALR 1447, 151 ALR 1462, 152 ALR 1459, 154 ALR 1456, 156 ALR 1457, 157 ALR 1456.

Footnote 70. State ex rel. Tobias v Seitz, 161 Ohio St 269, 53 Ohio Ops 145, 119 NE2d 47.

Footnote 71. State ex rel. Tobias v Seitz, 161 Ohio St 269, 53 Ohio Ops 145, 119 NE2d 47.

Footnote 72. State ex rel. Tobias v Seitz, 161 Ohio St 269, 53 Ohio Ops 145, 119 NE2d 47.

Footnote 73. State ex rel. McHenry v Jenkins, 43 Mo 261; Welling v Bissell, 171 Misc 90, 11 NYS2d 784; State ex rel. Barton v McCracken, 51 Ohio St 123, 36 NE 941.

Footnote 74. State ex rel. Heffelfinger v Brown, 144 Iowa 739, 123 NW 779.

Footnote 75. State ex rel. Abel v Berg, 132 Minn 426; 157 NW 652; State ex rel. Jones v Foster, 39 Mont 583, 104 P 860.

Footnote 76. Cocke v Halsey, 41 US 71, 10 L Ed 891.

§ 9 Holding of second office

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under the common-law principle that no person may at the same time hold two incompatible public offices, or under constitutional or statutory provisions prohibiting the holding of two public offices, 77 a clerk of court may become disqualified from continuing in his office, or the office may be deemed vacated, by reason of his acceptance of a second office. Thus, the office of clerk has been held to be incompatible with that of paymaster in the United States Army, 78 and with that of United States Senator. 79 And a clerk of a federal District Court may not be appointed a commissioner, master, referee, or receiver in any case unless special reasons requiring such appointment are recited in the order of appointment. 80 Similarly, it is provided that the clerk or the assistant clerks of the Court of Customs and Patent Appeals shall not be appointed as commissioner, master, or referee in any case. 81 The office of county commissioner and clerk of court has been held to be incompatible. 82 On the other hand, a clerk of court does not hold an office of trust or honor under the United States and thus become ineligible under a state constitutional provision to hold a state office, by reason of membership on a selective service board. 83 Nor does a clerk become disqualified from continuing in office because he holds a position of trust under the United States, by reason of his having been ordered, as a National Guard officer, into active military service. 84 It has also been held that there is no incompatibility in holding the office of clerk of court and being a member of the state assembly. 85 Moreover, a statute making the clerk of the court of appeals a member of the state voting registration board is not unconstitutional on the ground that the clerk as a judicial officer was disqualified from holding an office in the executive department, since such clerk is not a judicial officer. 86

It has been held that a person holding two offices at the time a provision against the holding of two offices becomes effective may elect which one he desires to hold. 87

A candidate for the office of clerk of court, ineligible to hold that office by reason of his holding an incompatible office, may be elected to such clerk's office while under such disqualification, provided such disqualification can be and is removed before the new term of office begins. 88

It may be noted that under some constitutional or statutory provisions, the county clerk is also a clerk of court. 89

§ 9 ----Holding of second office [SUPPLEMENT]

Statutes:

28 USCS § 957 also provides that a clerk of a Bankruptcy Court may not be appointed a commissioner, master, referee, or receiver.

Footnotes

Footnote 77. Propriety of holding more than one office, see 63 Am Jur 2d, Public Officers and Employees §§ 61-81.

Footnote 78. *Taylor v Commonwealth*, 26 Ky 401.

Footnote 79. *State v Parkhurst*, 9 NJL 427.

Footnote 80. 28 USCS § 957.

Footnote 81. 28 USCS § 959(b).

Footnote 82. *Jordan v Pearce*, 91 Idaho 687, 429 P2d 419.

Footnote 83. *State v Joseph*, 143 La 428, 78 So 663 (Selective Service Act of 1917).

Annotation: 26 ALR 144, 145, §§ VII, X, s. 132 ALR 254, 147 ALR 1419, 148 ALR 1399, 150 ALR 1444.

Footnote 84. *Kennedy v Cook*, 285 Ky 9, 146 SW2d 56, 132 ALR 251.

Footnote 85. *People ex rel. Ryan v Green*, 58 NY 295 (deputy clerk of court); *McCabe v Kane*, 101 RI 119, 221 A2d 103.

Footnote 86. *Burton v Mayer*, 274 Ky 245, 118 SW2d 161.

Footnote 87. *United States v Harsha*, 172 US 567, 43 L Ed 556, 19 S Ct 294 (clerk of both Circuit Court and Circuit Court of Appeals).

And generally the person acquiring a right to a second office may select which office he will retain, but qualification for, and entrance into the duties of, a second office will constitute a vacation of the first. 63 Am Jur 2d, Public Officers and Employees § 77.

Footnote 88. *Jordan v Pearce*, 91 Idaho 687, 429 P2d 419, pointing out that the term of office of county commissioner would expire before the term of office of clerk of court would begin.

Footnote 89. *Lewis v Smith*, 198 Ark 244, 129 SW2d 229; *Union Bank & Trust Co. v County of Los Angeles*, 2 Cal App 2d 600, 38 P2d 442 (ovrld on other grounds *Minsky v Los Angeles*, 11 Cal 3d 113, 113 Cal Rptr 102, 520 P2d 726); *Olmstead v Meahl*, 219 NY 270, 114 NE 393.

When the county clerk is acting as clerk of court, he is a state officer and he is part of the judicial system of the state. *Olmstead v Meahl*, *supra*; *Rodriguez v State*, 55 Misc 2d 669, 285 NYS2d 896.

§ 10 Removal or suspension

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A clerk of court may be removed from office under appropriate circumstances. Removal sometimes results from the exercise of powers conferred on the court making the appointment 90 or on the highest state court, 91 or may be effected through proceedings brought for that purpose. 92 The general rule that the power of removal is incident to the power of appointment, when the term or tenure of a public officer is not fixed by law and the removal is not governed by constitutional or statutory provision, 93 has been applied to removal of clerks by the appointing court. 94

Generally, courts have no power summarily to remove or suspend their clerks of courts who are constitutional officers elected by the people for fixed terms. 95 And a constitutional provision making clerks of certain courts subject to removal by the judges of those courts for cause spread on the record does not clothe a judge with arbitrary power to remove a clerk for any cause which the judge may think proper to spread on his minutes. 96 However, a statute empowering a majority of the judges of the state's highest court summarily to remove clerks of courts when the public good so requires does not violate a constitutional provision that the judicial department shall never exercise legislative or executive powers. 97

In ouster proceedings, the power to remove a clerk of court may be limited to removal for cause, 98 on notice, 99 and after a trial on charges. 1 Courts must comply with the statutory procedure. 2

Where the ground for removal is misconduct in office, the misconduct must have some connection with the clerk's official duties, 3 such as misappropriation of funds to the clerk's personal use. 4 However, a statutory provision that the clerk of court shall hold office during good behavior has been held not to limit the grounds for removal to misconduct in office. 5 Under a statute providing for removal of a clerk for any misfeasance in office or neglect of official duty that the court may consider sufficient ground, the clerk is subject to removal if he conducts his office so negligently, carelessly, or recklessly as to show utter want of care or concern such as would be tantamount to fraud. 6 In a proper case a clerk may be removed for gross negligence in the care of the court's funds and general laxity in the supervision of the clerk's office. 7 A statute authorizing removal of a clerk on conviction of a misdemeanor in office or of a felony is applicable to all felonies, but only to misdemeanors in office. 8

Statutory provision is sometimes made for suspension of a clerk pending the hearing of charges against him, 9 and a clerk pro tempore may sometimes be appointed to perform the duties of the office until such charges are heard and determined. 10 The clerk may not, however, be suspended for misconduct committed in another office prior to commencement of his term as clerk. 11

Where a clerk of court is appointed under a continuing power of the court and holds office at the will of the court, the appointment of a successor is per se a removal of the

§ 10 ----Removal or suspension [SUPPLEMENT]

Statutes:

28 USCS § 792 was repealed in 1982 by PL 97-164.

Case authorities:

Where plaintiff's probationary employment as docket clerk for United States District court was terminated, order requiring implementation of criteria in court's employment process that conformed with Constitution and Title VII of Civil Rights Act of 1964, 42 USCS § 2000e et seq., was unnecessary, because clerical position occupied by plaintiff was outside competitive civil service and therefore not covered by equal employment provisions of Civil Rights Act of 1974; plaintiff had no property interest in her position protected by due process under Constitution or, since such position was not covered under any merit or civil service system, by employment contract. *Williams v McClellan* (1978, CA8 Ark) 569 F2d 1031.

Footnotes

Footnote 90. In the federal court system, removal of a clerk is effected by the particular court appointing him, under the following statutory authority: United States Supreme Court (28 USCS § 671(a)); Court of Appeals (28 USCS § 711(a)); District Court (28 USCS § 751(a)); Court of Customs and Patent Appeals (28 USCS § 831); Court of Claims (28 USCS § 791(a)); Customs Court (28 USCS § 871).

Footnote 91. *Re Opinion of Justices*, 300 Mass 596, 14 NE2d 465, 118 ALR 166.

Footnote 92. *Commonwealth ex rel. Atty. Gen. v Furste*, 288 Ky 358, 156 SW2d 198; *Re Theofel*, 143 Misc 666, 258 NYS 61; *Stephens v Dowell*, 208 NC 555, 181 SE 629.

Footnote 93. 63 Am Jur 2d, Public Officers and Employees § 179.

Footnote 94. *Ex parte Hennen*, 38 US 230, 10 L Ed 138.

Annotation: 118 ALR 171, § II.

Footnote 95. *Ex parte Lehman*, 60 Miss 967.

Footnote 96. *Ex parte King*, 35 Tex 657.

Footnote 97. Appointment to and removal from public office are commonly executive or administrative functions, but exercise of the power of removal by the judges in the case of clerks of court is judicial in the sense that it is incidental to performance of judicial duties, and such removal may be made as an administrative act without judicial process or without explicit requirements for hearing. *Re Opinion of Justices*, 300 Mass 596, 14 NE2d 465, 118 ALR 166 (validity of removal rests on intimate relation between duties

of such officers and performance of service essential to courts).

Footnote 98. *Re Theofel*, 143 Misc 666, 258 NYS 61.

Footnote 99. *Stephens v Dowell*, 208 NC 555, 181 SE 629.

Footnote 1. *Re Theofel*, 143 Misc 666, 258 NYS 61.

Footnote 2. *Trent v State*, 195 Tenn 350, 259 SW2d 657.

Footnote 3. *State ex rel. Beck v Harvey*, 148 Kan 166, 80 P2d 1095; *State ex rel. Henson v Sheppard*, 192 Mo 497, 91 SW 477, holding that the court was without jurisdiction to remove a clerk of court from office because of an information against him for murder wholly disconnected with his office.

Footnote 4. *State ex rel. Beck v Harvey*, *supra*.

A clerk of the district court who kept for his own benefit interest on money in his official custody deposited in a bank is subject to ouster under a statute making violation of a penal statute involving "moral turpitude" the basis for ouster of officers. *State ex rel. Griffith v Anderson*, 117 Kan 117, 230 P 315, adhered to 117 Kan 540, 232 P 238.

Footnote 5. *Massachusetts Bar Asso. v Cronin*, 351 Mass 321, 220 NE2d 629, holding that prior misconduct in another office and subsequent false testimony before a grand jury while the defendant was clerk of court were sufficient cause for removal from the office of clerk of court, and that the fact that the false testimony before the grand jury had no relation to the office of clerk of court was of no consequence in determining the sufficiency of the cause for removal.

Footnote 6. *Commonwealth ex rel. Atty. Gen. v Furste*, 288 Ky 358, 156 SW2d 198.

Footnote 7. *Re Gray*, 256 App Div 259, 9 NYS2d 727.

Footnote 8. *Trent v State*, 195 Tenn 350, 259 SW2d 657.

Footnote 9. *Batley v Wheeler*, 145 Iowa 16, 123 NW 737.

Footnote 10. *State ex rel. Henson v Sheppard*, 192 Mo 497, 91 SW 477.

Footnote 11. *Montgomery v Nowell*, 183 Ark 1116, 40 SW2d 418.

Footnote 12. *Ex parte Hennen*, 38 US 230, 10 L Ed 138.

IV. FEES AND COMPENSATION

§ 11 Generally

In view of the fact that compensation is not indispensable to a public office, 13 any right which a clerk may have to compensation for services performed, whether by way of salary 14 or fees, 15 must be found in some constitutional or statutory provision. 16 He may be required to perform gratuitously or without charge those services for which no compensation is fixed by law, 17 though there is authority to the effect that in the absence of a statute fixing fees at the time a clerk renders services, he is entitled to a reasonable compensation if the legislative intent that he should be compensated is clear. 18

The personal representative of a deceased clerk of court is entitled to recover for the unused vacation and compensatory time standing to the credit of such clerk at the time of his death. 19

A clerk of a federal district court is forbidden by statute to receive compensation or emoluments through any office or position to which he is appointed by the court, other than that received as such clerk, whether from the United States or from private litigants. 20

Acts of a deputy on behalf of the clerk are such a performance as to allow payment of a special compensation prescribed for those acts, even if the clerk is performing similar acts in person elsewhere in accordance with his official duties and receiving the special compensation therefor. 21

An officer de facto has no enforceable right to a salary or fee. He must prove his legal right to the office to recover. 22

Footnotes

Footnote 13. See 63 Am Jur 2d, Public Officers and Employees §§ 360 et seq.

Footnote 14. § 13, *infra*.

Footnote 15. § 14, *infra*.

Footnote 16. *Ader v Howard* (Ky) 263 SW2d 491; *McQuay, Inc. v Hunter*, 234 Miss 84, 105 So 2d 476; *Freeman v Swan*, 192 Tenn 146, 237 SW2d 964; *Nacogdoches County v Jinkins* (Tex Civ App) 140 SW2d 901, error ref.

Where the statute directing the deposit of certain records and official papers of an abolished office with the clerk of court makes no provision for compensating the clerk, no compensation can be awarded the clerk for his filing of such records and papers. *United States v Van Duzee*, 185 US 278, 46 L Ed 909, 22 S Ct 648.

Footnote 17. *Ader v Howard* (Ky) 263 SW2d 491.

Footnote 18. *Bohart v Anderson*, 24 Okla 82, 103 P 742.

Footnote 19. *Konig v McCoy*, 63 Misc 2d 1038, 314 NYS2d 223.

Footnote 20. 28 USCS § 751(d), stating also that this subsection does not apply to clerks appointed as United States commissioners pursuant to 28 USCS § 631.

Footnote 21. *United States v King*, 147 US 676, 37 L Ed 328, 13 S Ct 439.

Footnote 22. *Romero v United States (F)* 24 Ct Cl 331; *McCollough v Douglas County*, 50 Neb 389, 34 NW2d 654.

A de facto officer cannot recover the compensation annexed to the office, since the salary therefor is incident to the title of the office and not to its occupation and exercise. *Burke v Edgar*, 67 Cal 182, 7 P 488.

Although a de facto officer cannot maintain an action to recover the compensation attached to the office, where he acts in good faith and actually renders service, the fees or salary received by him cannot be recovered by public authorities. *McKenna v Nichols*, 295 Ky 778, 175 SW2d 121, applying rule in denying recovery by county of statutory fees received from litigants for services performed by one irregularly appointed clerk of quarterly court.

§ 12 Fixing and changing compensation

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The fees and emoluments of clerks of state courts, created by state constitutions, may be reduced by the legislature not only by direct legislation, but also incidentally by the division of towns and counties and the erection of new courts, as the public good may from time to time require. But the legislature cannot take from such a constitutional officer the substance of the office itself and transfer it to another who is to be appointed in a different manner and to hold the office by a different tenure from that which was provided for by the constitution. ²³ Nor can a legislature repeal in toto a statutory provision for the salary of a clerk or assistant clerk, whose office is created by the constitution, without making any other provision for such salary. ²⁴ Obviously there can be no interference by the state with the allowance of fees to officers of the federal courts or by the Federal Government. ²⁵

By statute the United States Supreme Court may fix the compensation of a clerk appointed by it, ²⁶ and it is the duty of the Director of the Administrative Office of the United States Courts to fix the compensation of clerks of other federal courts. ²⁷

Statutes fixing the compensation of a clerk of court are strictly construed, ²⁸ but should receive a practical and reasonable construction. ²⁹

Footnotes

Footnote 23. Warner v People (NY) 2 Denio 272.

Footnote 24. Reid v Smoulter, 128 Pa 324, 18 A 445.

Footnote 25. This principle was recognized, but its application by the court under the facts was subsequently disapproved. Fields v Multnomah County, 64 Or 117, 128 P 1045.

Footnote 26. 28 USCS § 671(a).

Footnote 27. 28 USCS § 604(a)(5).

Footnote 28. State ex rel. May v Fussell, 157 Fla 55, 24 So 2d 804; Covington v Quitman County, 196 Miss 416, 17 So 2d 597; Moore v Sheppard, 144 Tex 537, 192 SW2d 559.

Footnote 29. Sumter County v Allen, 193 Ga 171, 17 SE2d 567; Hanson v Griffiths, 204 Misc 736, 124 NYS2d 473, affd 283 App Div 662, 127 NYS2d 819.

§ 13 Method of compensation—salary

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The method of paying the compensation of a clerk of court is generally fixed by law. 30 Under statutory or constitutional provisions in some jurisdictions his compensation takes the form of a salary, 31 and where a designated amount is fixed for all services rendered he may not ordinarily receive other compensation. 32

A per diem compensation for clerks of courts provided by some statutes is not a fee, but an emolument; where payable for attendance at court it is not dependent on the transaction of any business by the court on that day, but on the fact that the court is actually in session. 33

Footnotes

Footnote 30. Campbell v Boston, 290 Mass 427, 195 NE 802.

Although the office of circuit clerk is created by the constitution, the legislature has full power to fix the amount of compensation, observing all constitutional limitations, and it is immaterial whether the compensation is by fees or salary. Washington County v Davis, 162 Ark 335, 258 SW 324.

Footnote 31. Losche v Marion County, 207 Ind 44, 191 NE 143; Meade County v Neafus (Ky) 395 SW2d 573; Campbell v Boston, 290 Mass 427, 195 NE 802; Board of Com'rs v Beaty, 67 Okla 281, 171 P 34; Gregory v Trousdale County, 194 Tenn 670, 254 SW2d 753; Arthur v County Court of Cabell County, 153 W Va 60, 167 SE2d 558.

Footnote 32. *Losche v Marion County*, 207 Ind 44, 191 NE 143.

Footnote 33. *State ex rel. Tippecanoe County Com'rs v Flynn*, 161 Ind 554, 69 NE 159; *United States v Warren*, 12 Okla 350, 71 P 685.

Annotation: 1 ALR 290, § IV(h).

A clerk entitled to a per diem for attendance at court may not be entitled to a per diem for the period of time he and his deputies were employed on other matters, such as copying a list of delinquent taxes on real estate and entering judgment as against each parcel in such list, as by law required. *Davenport v Board of County Comrs.*, 40 Minn 335, 42 NW 20.

§ 14 --Fees and commissions

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under some statutes the compensation of a clerk of court, at least as to certain services, is made to depend on the fees received or collected, 34 or on commissions on funds handled. 35 The term "fees" is applied to the items chargeable by law between the court officer and the party whom he serves, as distinguished from "costs," a term more correctly applied to the expenses of litigation as between litigants. 36

The right of the clerk to collect fees for particular services has been involved in numerous cases under varying statutory provisions. Any detailed discussion would be of little value since these matters are dependent on local statutes and rules, but for illustrative purposes mention may be made of certain particular services for which fee provisions have been or may be made. Under statute or rule of court in various jurisdictions a clerk of court is entitled to fees for issuing summons or other process, 37 entering appearance of each defendant to a suit, 38 filing or recording papers, 39 administering of oaths or taking affidavits, 40 taking of acknowledgments, 41 entering judgments 42 or orders, 43 making and preparing transcripts, 44 services in connection with judicial sales, 45 and rendering services in criminal cases in connection with affidavits of inability to pay costs. 46

A statutory fee for copies of instruments, enacted before the use of the typewriter was contemplated, does not embrace carbon copies of instruments made by a typewriter, recovery by the clerk for making such copies being limited to quantum meruit for the extra expense and service in producing them. 47

It may be noted, with respect to the federal courts, that former detailed provisions under which the clerk was authorized to charge and collect a specific fee for each item of service performed in every action at law or suit in equity 48 have been replaced by greatly simplified provisions. 49

§ 14 --Fees and commissions [SUPPLEMENT]

Case authorities:

Clerk was entitled to 45 days' interest on treasury bills that were purchased by party as security pending appeal of judgment against party since statute does not preclude investment by litigant nor eliminate fee where funds are invested by litigant and, although clerk did not make investment, clerk's duties were not insignificant for they involved monitoring maturity dates of treasury bills and determining when they should be repurchased and acting as trustee. *John Morrell & Co. v Local Union 304A of United Food & Commercial Workers, etc.* (1991, CA8 SD) 949 F2d 266.

Footnotes

Footnote 34. *Burnett v Stephenson*, 193 Ark 383, 100 SW2d 256; *Board of County Comrs. v Sloan* (Fla App) 214 So 2d 74; *Owens v Maddox*, 80 Ga App 867, 57 SE2d 826; *Minnehaha County v Foster*, 61 SD 406, 249 NW 688; *Anderson v Maury County*, 193 Tenn 62, 242 SW2d 81.

Footnote 35. *State by Bontempo v Pellini*, 75 NJ Super 161, 182 A2d 566.

A statute authorizing a clerk to charge a commission for receiving, handling, and disbursing alimony under order of court did not apply to a cash payment of alimony under a decree which did not order that this particular fund be handled by the clerk. *Champion v Champion*, 180 Tenn 259, 174 SW2d 454.

Footnote 36. *Bohart v Anderson*, 24 Okla 82, 103 P 742.

See 20 Am Jur 2d, Costs § 1.

Footnote 37. *United States v Jones*, 193 US 528, 48 L Ed 776, 24 S Ct 561; *Sebastian Bridge Dist. v Lynch*, 200 Ark 134, 138 SW2d 81; *Owens v Maddox*, 80 Ga App 867, 57 SE2d 826.

Footnote 38. *Buchanan v Girvin*, 142 Tex 134, 176 SW2d 729.

Footnote 39. *United States v Van Duzee*, 140 US 169, 35 L Ed 399, 11 S Ct 758; *State use of Independence County v Baker*, 197 Ark 1075, 126 SW2d 937; *Marine Trust Co. v Kenngott*, 262 App Div 366, 29 NYS2d 171.

A statutory provision that clerks of the district court may charge a designated sum "for filing any papers . . . not otherwise provided for" does not apply to the filing of an affidavit supporting a motion for new trial, where the same statute provides specifically for a higher fee from the moving party. *Beck v Lee*, 52 Utah 31, 172 P 686.

A statute giving a clerk a certain fee for "filing each paper" in a civil case refers only to papers that form part of the record proper, and is inapplicable to letters admitted as evidence. *Texas Brewing Co. v State* (Tex Civ App) 195 SW 211.

Footnote 40. *United States v Jones*, 193 US 528, 48 L Ed 776, 24 S Ct 561.

Footnote 41. *United States v Taylor*, 147 US 695, 37 L Ed 335, 13 S Ct 479.

Footnote 42. *Southwestern Freight Lines, Ltd. v Shafer*, 57 Ariz 111, 111 P2d 625.

Under a statute providing for a specified fee for entering judgment in habeas corpus cases, the clerk is entitled to recover such fee regardless of whether the offense charged was a misdemeanor or felony. *McCormick v Sheppard*, 126 Tex 25, 86 SW2d 213.

Footnote 43. *United States v McCandless*, 147 US 692, 37 L Ed 334, 13 S Ct 465.

Where a clerk is entitled to be compensated by a fee for the entry of an order, it matters not whether the order be material or the court have the right to enter it. *United States v Payne*, 147 US 687, 37 L Ed 332, 13 S Ct 442; *United States v Jones*, 147 US 672, 37 L Ed 325, 13 S Ct 437.

Footnote 44. *United States v Jones*, 193 US 528, 48 L Ed 776, 24 S Ct 561.

A transcript prepared by an attorney is "made and prepared" by a clerk, within a statute providing for transcript fees, where the clerk checked and certified the transcript. *McCourtney v Morrow*, 216 Ark 959, 229 SW2d 124.

A duly certified copy of the original stenographic notes is a transcript of the proceedings within the purview of the statute providing for fees for transcripts. *Sawtelle v Sawtelle*, 106 NH 304, 210 A2d 474.

A clerk of court is not entitled to collect costs for services he does not perform. Items of cost are improperly taxed for preparation of a transcript of testimony in connection with a transcript on appeal, where the clerk merely inserted into the transcript papers furnished by the court reporter, whose services had been fully paid for by appellant. *Hughes v Merchants Nat. Bank*, 260 Ala 100, 69 So 2d 276.

Failure of the clerk of court to comply with the statutory requirement that statement of costs for making a transcript shall specify the number of words in the transcript pages renders such statement of costs null and void. *Superior Oil Co. v Foote*, 216 Miss 728, 65 So 2d 453.

The clerk of court was entitled to the statutory fee for reproducing the transcript regardless of whether the reproduction was by typewriting or photostatic process. *Superior Oil Co. v Foote*, *supra*.

Footnote 45. *The Cesare Augusto* (DC Cal) 39 F Supp 751; *Re Griel's Estate*, 171 Pa 412, 33 A 375.

Footnote 46. *United States v Jones*, 193 US 528, 48 L Ed 776, 24 S Ct 561.

Footnote 47. *Werner v Hillman Coal & Coke Co.*, 300 Pa 256, 150 A 471, 70 ALR 967.

Footnote 48. See *Re Taxation of Costs in Actions, etc.* (DC Ohio) 17 F2d 779, commenting on the former practice, as illustrated by *United States v Van Duzee*, 140 US 169, 35 L Ed 399, 11 S Ct 758.

Footnote 49. See 28 USCS § 1914, filing fees in civil suits; provision for establishment of additional fees by Judicial Conference.

§ 15 Extra services

[View Entire Section](#)
[Go to Parallel Reference Table](#)

As a general rule, a clerk of court is not entitled to recover extra compensation for extra services where there is no constitutional or statutory authorization therefor. 50 In the absence of a controlling statutory or constitutional provision authorizing extra compensation, the ordinary rule is that if the duties of a clerk of court are increased by the addition of other duties germane to his office, he must perform them without extra compensation; 51 but if he is employed to render services in an independent employment not incidental to his official duties, he may recover for them. 52 Where it is competent for a clerk to hold an office distinct from but compatible with his clerkship, as, for instance, that of a commissioner, he is entitled to receive compensation for each. 53

Footnotes

Footnote 50. Board of Com'rs v Compton, 77 Okla 196, 187 P 801; Arthur v County Court of Cabell County, 153 W Va 60, 167 SE2d 558.

Footnote 51. United States v King, 147 US 676, 37 L Ed 328, 13 S Ct 439; Arthur v County Court of Cabell County, 153 W Va 60, 167 SE2d 558.

Absent any constitutional or statutory provision authorizing extra compensation for services rendered by the clerk of court or his deputy, allowance of extra compensation to the clerk of court for restoring destroyed court records pursuant to order of the court was not justified. Board of Com'rs v Compton, 77 Okla 196, 187 P 801.

Footnote 52. United States v King, *supra*.

A county clerk can legally accept from the county supervisors an employment to act as county purchasing agent at an additional compensation, where the duties of the purchasing agent are no part of the duties to be performed by the clerk, and the board of supervisors has no authority to require him in his official capacity as clerk to perform the duties of purchasing agent. Mousseau v Garey, 200 Cal 201, 252 P 324.

That the keeping of a current general index of recorded instruments is an official duty of the clerk and his deputy does not render invalid a contract to compensate the deputy clerk for the compilation of a general index of records prior to his term of office, particularly where the series of indexes previously in use had become worn and defaced. Land v Lewis, 299 Ky 866, 186 SW2d 803, 159 ALR 601.

Statute providing that the salary paid to the clerk of court is to compensate him for all services required of him or which may devolve upon him by law did not preclude him from receiving compensation for services he may provide which are not required by law. *Anderson v Hinman*, 138 Mont 397, 357 P2d 895, holding that the clerk of court was not required to account for moneys received from a law publisher for furnishing uncertified, unofficial court opinions.

Where the state comptroller engaged clerks of the county circuit courts to sell documentary tax stamps and the sale of such stamps was not part of their official duties, the commissions they received for the sale of such stamps were not part of their statutory compensation and they were not required to report and pay over such commissions to the county as excess fees. *Board of County Comrs. v Sloan* (Fla App) 214 So 2d 74.

Footnote 53. *Erwin v United States* (DC Ga) 37 F 470.

Extra compensation for the services of a clerk or deputy clerk of a United States Court, appointed as a commissioner, is authorized under 28 USCS §§ 631(c), 753(d).

§ 16 Contracts or conduct affecting compensation

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the general rule that a public officer may not render services for fees less than those established by law, 54 a clerk of court may not contract to accept less than the statutory fees for services, such a contract being illegal and against public policy. 55 A like rule applies to a contract of a public officer to accept less than the statutory salary, 56 and acceptance by a clerk of a lesser sum under such a contract does not operate as an estoppel precluding recovery of the sum legally due. 57

Nor can an estoppel arise from acceptance under mistake of law of less than the salary legally due. 58

Footnotes

Footnote 54. 63 Am Jur 2d, Public Officers and Employees § 395.

Footnote 55. *Duncan v Scott County*, 68 Ark 276, 57 SW 934; *Werner v Hillman Coal & Coke Co.*, 300 Pa 256, 150 A 471, 70 ALR 967; *Maryland Casualty Co. v State*, 130 Tex 206, 107 SW2d 865.

A clerk may not waive statutory fees for the preparation of a transcript. *McCourtney v Morrow*, 216 Ark 959, 229 SW2d 124 (transcript actually prepared in attorney's office).

Annotation: 70 ALR 973, § II, s. 118 ALR 1459, § II, 160 ALR 491, § II(a)(1).

Footnote 56. 63 Am Jur 2d, Public Officers and Employees § 393.

Footnote 57. *Louisville v Thomas*, 257 Ky 540, 78 SW2d 767; *Maryland Casualty Co. v State*, 130 Tex 206, 107 SW2d 865.

Annotation: 118 ALR 1468, § IV, s. 160 ALR 502, § III(b)(2).

Footnote 58. *State ex rel. Moss v Hamilton*, 303 Mo 302, 260 SW 466.

§ 17 Accounting for and disposition of fees

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The disposition of fees paid to clerks of courts is generally governed by statute. 59 In some jurisdictions in which the compensation of a clerk of court is limited by statute to a fixed salary, he is required to pay into the public treasury all fees earned and collected by him in his official capacity. 60 In other jurisdictions he accounts to the public treasury only for fees in excess of the compensation authorized to be retained as salary after disbursements for expenses of office. 61

Fees illegally collected by a clerk of court under color of office must usually be accounted for and paid to the public agency in whose name and by whose authority they were collected. 62 As between the clerk and the public agency, the sums charged and received are those for which he is accountable, and he is estopped to assert that they were illegally collected. 63

The clerk of the United States Supreme Court is required to pay into the Treasury all fees, costs, and other moneys collected by him, and must make annual returns to the court under regulations prescribed by it. 64 The fees and emoluments of the office belong to the government, subject only to payment of the clerk's annual salary. 65 Clerks of other federal courts are required to pay into the Treasury all fees, costs, and other moneys collected by them, and to make return to the Director of the Administrative Office of the United States under regulations prescribed by him. 66

Footnotes

Footnote 59. *Anderson v Hinman*, 138 Mont 397, 357 P2d 895.

Footnote 60. *Cunningham v Cherokee County*, 258 Ala 30, 61 So 2d 123; *Board of Comrs. v Dickey*, 86 Minn 331, 90 NW 775; *Anderson v Hinman*, 138 Mont 397, 357 P2d 895.

Footnote 61. *Oil Well Supply Co. v Wickwire* (DC Ill) 52 F Supp 921; *Airy v People*, 21 Colo 144, 40 P 362; *Orange County v Robinson*, 111 Fla 402, 149 So 604; *Ader v Howard* (Ky) 263 SW2d 491; *Clay County v Stone*, 208 Tenn 1, 343 SW2d 863.

Footnote 62. *Yuma County v Wisener*, 45 Ariz 475, 46 P2d 115, 99 ALR 642.

Annotation: 99 ALR 647.

Footnote 63. *Tarrant County v Rogers*, 104 Tex 224, 135 SW 110, motion overr 104 Tex 226, 136 SW 255.

Footnote 64. 28 USCS § 671(d).

Footnote 65. *Bean v Patterson*, 110 US 401, 28 L Ed 190, 4 S Ct 23.

Footnote 66. See 28 USCS § 711(c) (clerks of Courts of Appeal); 28 USCS § 791(b) (clerk of Court of Claims); 28 USCS § 831 (clerk of Court of Customs and Patent Appeals); 28 USCS § 751(e) (clerks of Federal District Courts).

§ 18 --Naturalization fees

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The amount and disposition of fees for receiving and filing declarations of intention and for issuing certificates of naturalization are controlled by federal statute, 67 to which conflicting state statutes must yield. 68 Under the federal statute the clerk of any state naturalization court is required to account for and pay over to the proper federal authority half of the naturalization fees received, up to a designated maximum amount, and all such fees in excess of that amount collected in any fiscal year. 69 The clerk of a state court and the surety on his bond are liable to the United States for the clerk's failure to account for naturalization fees collected in his official capacity. 70 The disposition of the fees which the clerk retains is subject to the state law. 71

A salaried clerk of court, required by state law to account to the public treasurer for all fees and emoluments, is required to account for the naturalization fees he has collected. 72 He may not retain for his personal use half of such fees. 73

Clerks of federal district courts are under statutory obligation to pay over all fees received in naturalization proceedings. 74

Footnotes

Footnote 67. 8 USCS § 1455.

Footnote 68. *Hampden County v Morris*, 207 Mass 167, 93 NE 579; *State ex rel. Newman v Libby*, 47 Wash 481, 92 P 350.

Footnote 69. 8 USCS § 1455(c), providing for accounting and payment over to Attorney General of half of fees up to the sum of \$6,000 and all fees over that amount.

Footnote 70. *Indiana ex rel. United States v Killigrew* (CA7 Ind) 117 F2d 863.

Footnote 71. *Mulcrevy v San Francisco*, 231 US 669, 58 L Ed 425, 34 S Ct 260.

Footnote 72. Under a state statute directing county clerks to pay into the county treasury all fees "allowed by law," fees received in naturalization proceedings come within the quoted term. *County of Alameda v Cook*, 32 Cal App 165, 162 P 405.

Footnote 73. *Mulcrevy v San Francisco*, 231 US 669, 58 L Ed 425, 34 S Ct 260; *Barron County v Beckwith*, 142 Wis 519, 124 NW 1030.

Footnote 74. 8 USCS § 1455(d), which further provides, however, that the clerks of the Federal District Courts for the Virgin Islands and for Guam shall report but shall not be required to pay over to the Attorney General the fees collected by such clerks in naturalization proceedings.

§ 19 Right to demand prepayment of fees

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Ordinarily a clerk of court is entitled to demand prepayment of his fees before performance of services requested of him, 75 and may justifiably refuse to act until the proper fee has been paid. 76 Where the requirement of a statute or rule to pay filing fees in advance is merely directory 77 or within the discretion of the clerk of court, the clerk of court may extend credit but he is not obliged to do so, and when he does, it is at his risk. 78 In other words, the clerk can waive advance payment of fees and thereby accept personal liability for their payment. 79 Where the statute or rule requiring the payment of filing fees in advance is merely directory or discretionary, the payment of such fee is not a condition precedent to the filing of a paper, and failure to pay the fee in advance does not render the filing of a paper ineffective. 80

In some instances, however, the right to prepayment has been denied, as where the state is a party, or the party is an indigent party proceeding in forma pauperis without payment of fees as permitted by statute, 81 or the statute makes the clerk's fees due at the end of a specified period after rendition of services. 82

Footnotes

Footnote 75. *Bean v Patterson*, 110 US 401, 28 L Ed 190, 4 S Ct 23; *Bohart v Anderson*, 24 Okla 82, 103 P 742.

Where the state statute provides that the fees of the clerk of court for filing certain papers shall be paid in advance, payment of the filing fee is a condition precedent to filing. *Oil Well Supply Co. v Wickwire* (DC Ill) 52 F Supp 921.

Footnote 76. *Poetz v Mix*, 7 NJ 436, 81 A2d 741; *Bohart v Anderson*, 24 Okla 82, 103 P 742; *United States Nat. Bank v Underwriters at Lloyd's, London*, 239 Or 298, 382 P2d

851; *Hamilton v Department of Industry, Labor & Human Relations*, 56 Wis 2d 673, 203 NW2d 7 (ovrld on other grounds *Re Pewaukee* (Wis) 241 NW2d 603).

Footnote 77. *Poetz v Mix*, 7 NJ 436, 81 A2d 741.

Generally, as to filing fees, see § 14, *supra*.

Footnote 78. *Hamilton v Department of Industry, Labor & Human Relations*, 56 Wis 2d 673, 203 NW2d 7 (ovrld on other grounds *Re Pewaukee* (Wis) 241 NW2d 603).

Footnote 79. *Poetz v Mix*, 7 NJ 436, 81 A2d 741; *United States Nat. Bank v Underwriters at Lloyd's, London*, 239 Or 298, 382 P2d 851.

Footnote 80. *Poetz v Mix*, 7 NJ 436, 81 A2d 741; *United States Nat. Bank v Underwriters at Lloyd's, London*, 239 Or 298, 382 P2d 851.

Footnote 81. *Humphrey v Mauzy*, 155 W Va 89, 181 SE2d 329 (clerk of court had no legal right, even at court's direction, to withhold recording of divorce orders merely because plaintiffs were unable to pay fees).

Footnote 82. *Jeffers v Taylor*, 178 Ky 392, 198 SW 1160.

§ 20 Remedies for recovery

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A clerk of court may recover his fees by suit against the person responsible for payment in the same manner as a private person would proceed, ⁸³ although more expeditious means may be available under particular statutory provisions. ⁸⁴ Moreover, a clerk, if he has rendered services under an invalid contract to accept less than the statutory fee, may ordinarily collect the full amount of the fee in a proper action. ⁸⁵

Footnotes

Footnote 83. *Wickliff v Robinson*, 18 Ill 145; *Moser v Summers*, 172 Ky 553, 189 SW 715; *Johnson v MacCoy*, 32 W Va 552, 9 SE 887.

As to circumstances under which the clerk is entitled to look to the attorney for the payment of fees, see Annotation: 100 ALR 539 et seq. See also 7 Am Jur 2d, Attorneys at Law § 200.

Footnote 84. For example, by issuance and levy of a fee bill (*Wickliff v Robinson*, 18 Ill 145; *Hoover v Missouri P. R. Co.*, 115 Mo 77, 21 SW 1076); by distress warrant (*Moser v Summers*, 172 Ky 553, 189 SW 715); by execution (*Westcott v Booth*, 49 Ala 182).

Footnote 85. A prothonotary may recover the amount of the fee fixed by law for making

copies of records and papers in his office, even though he may have agreed to furnish them for a less sum. *Werner v Hillman Coal & Coke Co.*, 300 Pa 256, 150 A 471, 70 ALR 967.

Contracts affecting compensation, § 16, *supra*.

V. POWERS AND DUTIES

§ 21 Generally; ministerial character of acts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The clerk of a court, except for authority ordinarily conferred to perform certain judicial or quasi-judicial duties, serves in a ministerial capacity for the court. 86 He acts as custodian of the court's records, 87 receives money in his official capacity, but, as a rule, only as authorized by statute, 88 and generally performs such duties as are enjoined by statute 89 or imposed by lawful authority of the court. 90

In the performance of his duties as a ministerial officer of the court, the clerk is subject to the control of the court. 91 If he fails to obey an order of the court, he may be guilty of contempt, 92 even when the order is erroneous in law. 93

There is some conflict as to the judicial or ministerial nature of certain specific duties of a clerk of court; but his duty is purely ministerial when it is prescribed by statute. 94 Entry of judgments for the record is a ministerial duty, as distinguished from rendition of the judgment as the judicial act of the court, 95 and in those jurisdictions where a clerk is empowered by statute to enter judgments by default without any direction of the court or judge, he is considered as acting in a purely ministerial capacity and is strictly limited to the scope of the power conferred by statute. 96

Approval of certain bonds given in the course of judicial proceedings, or of bonds given by officers such as executors and guardians, is a duty frequently imposed by statute on clerks of courts. 97

Clerks of courts are among those officers who may be authorized by statute to take acknowledgments, an act generally viewed as ministerial rather than judicial. 98

The clerk of each federal court and his deputies are forbidden to practice law in any court of the United States. 99

Footnotes

Footnote 86. *Midwestern Developments, Inc. v Tulsa* (CA10 Okla) 319 F2d 53; *Pan American World Airways, Inc. v Gregory* (Fla App) 96 So 2d 669 (disapproved on other

grounds *Stevenson v Arnold* (Fla) 250 So 2d 270); *Stine v Shuttle*, 134 Ind App 67, 186 NE2d 168; *State ex rel. Wanamaker v Miller*, 164 Ohio St 174, 57 Ohio Ops 151, 128 NE2d 108; *Benge v Foster* (Tex Civ App) 47 SW2d 862, error ref; *Falls Church v Myers*, 187 Va 110, 46 SE2d 31.

The official duties of the clerk are ministerial when they are absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts, and judicial when they are dependent on the result of judgment or discretion which is judicial in its nature. *People v May*, 251 Ill 54, 95 NE 999, error dismd 232 US 720, 58 L Ed 814, 34 S Ct 602.

Footnote 87. § 24, *infra*.

Footnote 88. *Howard v United States*, 184 US 676, 46 L Ed 754, 22 S Ct 543; *Aicardi v Robbins*, 41 Ala 541; *Ball v Bank of State*, 8 Ala 590; *Gilmore v Walker*, 195 NC 460, 142 SE 579, 59 ALR 53.

Where clerks of court are not authorized by statute to receive payment of judgments or to accept money on judgments as paid into the registry of the court without a judicial order for that purpose, payment to such officers on a judgment without prior authority or subsequent ratification on the part of the judgment creditor does not amount to payment to the latter. *Hendry v Benlisa*, 37 Fla 609, 20 So 800.

Liability of clerk for money received, §§ 30-34, *infra*.

Footnote 89. *State ex rel. Atty. Gen. v Hasty*, 184 Ala 121, 63 So 559; *Gilmore v Walker*, 195 NC 460, 142 SE 579, 59 ALR 53; *Hamilton v Department of Industry, Labor & Human Relations*, 56 Wis 2d 673, 203 NW2d 7 (ovrld on other grounds *Re Pewaukee* (Wis) 241 NW2d 603).

Practice Aids: –Powers and duties of clerks of court. 4 Am Jur Legal Forms 2d, Clerks of Court §§ 58:11 et seq.

Footnote 90. §§ 22 et seq., *infra*.

Footnote 91. *State ex rel. Caldwell v Cockrell*, 280 Mo 269, 217 SW 524; *State ex rel. Tolls v Tolls*, 160 Or 317, 85 P2d 366, 119 ALR 1370 (ovrld on other grounds *Burnett v Hatch*, 200 Or 291, 266 P2d 414).

Footnote 92. *Shelley v Thomas*, 232 Ala 227, 167 So 316; *Ex parte Thatcher*, 7 Ill 167; *State ex rel. Caldwell v Cockrell*, 280 Mo 269, 217 SW 524; *Territory v Clancy*, 7 NM 580, 37 P 1108.

Footnote 93. The fact that a court order requiring payment of accrued temporary alimony and suit money is not properly a judgment constituting a lien on realty and on which execution may be issued does not prevent the clerk's refusal to obey the court's direction to docket it in the judgment lien docket from being a contempt. *State ex rel. Tolls v Tolls*, 160 Or 317, 85 P2d 366, 119 ALR 1370 (ovrld on other grounds *Burnett v Hatch*, 200 Or 291, 266 P2d 414).

Annotation: 119 ALR 1380.

Footnote 94. *People v May*, 251 Ill 54, 95 NE 999, error dismd 232 US 720, 58 L Ed 814, 34 S Ct 602; *Mitchell v Short*, 251 Ill App 357; *Hornack v State*, 39 Ohio App 203, 177 NE 244; *Utah Ass'n of Credit Men v Bowman*, 38 Utah 326, 113 P 63.

Footnote 95. 46 Am Jur 2d, Judgments §§ 154, 156.

Footnote 96. *Landwehr v Gillette*, 174 Cal 654, 163 P 1018; *Kimbel v Osborn*, 61 Wyo 89, 156 P2d 279, 158 ALR 1079.

Annotation: 158 ALR 1092, § II(a).

Where parties agree that the report of a referee shall have the same force and effect as a judgment, and the court orders, by consent of the parties, that on filing the report with the clerk, judgment shall be entered in conformity therewith as if the cause had been tried before the court, a valid judgment may be entered by the clerk. *Heckers v Fowler*, 69 US 123, 17 L Ed 759.

Footnote 97. *Spain v Clements*, 63 Ga 786; *Marshall Field & Co. v Wallace*, 89 Iowa 597, 57 NW 303; *McNutt v Livingston*, 15 Miss 641; *Heater v Pearce*, 59 Neb 583, 81 NW 615; *Topping v Windley*, 99 NC 4, 5 SE 14.

Liability of clerk for approving insufficient bond, § 29, *infra*.

Footnote 98. See 1 Am Jur 2d, Acknowledgments §§ 12, 22.

Footnote 99. 28 USCS § 955.

§ 22 Judicial and quasi-judicial acts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A clerk of court may not exercise judicial power except by constitutional or legislative provision, 1 and then only in accordance with the strict language of the provision. 2 Absent such constitutional or statutory authority he cannot ordinarily perform functions of a purely judicial character, such as the signing and issuance of a writ of habeas corpus in vacation time where the law provides that such writs must be signed and issued by the judge, 3 the opening and adjourning of court, 4 the taking of bail, 5 the determination of the sufficiency of a complaint, 6 the issuance of writs of scire facias 7 or writs of assistance, 8 the granting of an injunction, 9 or the issuance of an execution without direction from the plaintiff or his attorney. 10 If the laws specially authorize or are construed to permit the clerk to issue writs of a judicial nature, the rule against it must, of course, yield. 11 But in the absence of statutory authorization, the authority to perform a judicial act, such as that of receiving a verdict, cannot be delegated to a clerk, either by the court or a judge thereof, though the litigants involved consent thereto. Nevertheless, insofar as misdemeanors and civil suits are concerned, it has been held that although it is irregular to delegate to a clerk authority to receive a verdict in the absence of the trial

judge, the parties concerned waive the irregularity if they consent thereto. 12

Certain acts, although partially judicial in nature, may be performed by the clerk of the court. A familiar example is the power to issue warrants of arrest. 13 It has been held in the absence of statute, however, that the taking of an affidavit in a criminal proceeding imposes a duty of a judicial nature and cannot be exercised by the clerk of a municipal court on whom have been conferred no powers of a judicial character, 14 although in some jurisdictions clerks of courts are expressly authorized to take such affidavits. 15

Footnotes

Footnote 1. *Gardner v Bunn*, 132 Ill 403, 23 NE 1072; *Re Terrill*, 52 Kan 29, 34 P 457; *Hornack v State*, 39 Ohio App 203, 177 NE 244.

It is well settled that although a clerk of court may perform acts of ministerial and nondiscretionary character with respect to judicial proceedings, such clerk has no judicial powers in the absence of specific statutory or constitutional authority. *State ex rel. Citizens Nat. Bank v Superior Court of Madison County*, 236 Ind 135, 138 NE2d 900.

A clerk of court in proceeding to open a trust was acting without statutory authority and his act purporting to grant a petition for opening of the trust was illegal and void. *State ex rel. Citizens Nat. Bank v Superior Court of Madison County*, *supra*.

Footnote 2. *Pacific Nat. Fire Ins. Co. v Irmiger*, 254 Wis 207, 36 NW2d 89.

When judicial or quasi-judicial powers are expressly conferred upon the clerk of court, the clerk's authority is strictly limited within the terms of the statutory or constitutional provision conferring it. *State ex rel. Citizens Nat. Bank v Superior Court of Madison County*, 236 Ind 135, 138 NE2d 900.

Footnote 3. *State ex rel. Stack v Grimm*, 239 Mo 340, 143 SW 450.

Footnote 4. *Re Terrill*, 52 Kan 29, 34 P 457.

Footnote 5. See 8 Am Jur 2d, *Bail and Recognizance* § 20, discussing authority of clerks of court to grant or refuse bail.

Footnote 6. *Newport v Culbreath*, 120 Fla 152, 162 So 340.

Footnote 7. *Frierson v Heirs of Harris*, 45 Tenn 146.

Footnote 8. *Williams v Sherman*, 35 Idaho 169, 205 P 259, 21 ALR 353; *Bruce v Roney*, 18 Ill 67.

In Pennsylvania it was held in an early case that the writ of assistance is so much a matter of course that the prothonotary could issue it when any decree or order for delivery of possession was rendered. *Commonwealth ex rel. Smith v Dieffenbach (Pa)* 3 Grant Cas 368, 5 Phila 236, 20 Phila Leg Int 140.

Annotation: 21 ALR 359, 360.

Footnote 9. *Lawrence v Morgan's R. & S.S. Co.*, 121 US 634, 30 L Ed 1018, 7 S Ct 1013; *Payton v McQuown*, 97 Ky 757, 31 SW 874.

Footnote 10. *Fitzgerald v Campbell*, 131 Va 486, 109 SE 308, 27 ALR 799.

See 30 Am Jur 2d, Executions § 37.

A clerk cannot issue execution on a judgment satisfied by the sale of property until the satisfaction is vacated, the levy and sale set aside, and an execution awarded by order of the court. The plain reason for this is that the clerk's duties are only ministerial, and the setting aside of a levy or a sale, or the vacating of the entry of a judgment, is a judicial act. *Hughes v Streeter*, 24 Ill 647.

Footnote 11. *Frierson v Heirs of Harris*, 45 Tenn 146.

Footnote 12. *State v Jackson*, 21 SD 494, 113 NW 880.

Footnote 13. *Kreulhaus v Birmingham*, 164 Ala 623, 51 So 297; *Stine v Shuttle*, 134 Ind App 67, 186 NE2d 168; *State v Furmage*, 250 NC 616, 109 SE2d 563; *State v Van Brocklin*, 194 Wis 441, 217 NW 277.

Generally, see 5 Am Jur 2d, Arrest § 10.

Footnote 14. *Cox v Perkins*, 151 Ga 632, 107 SE 863, 16 ALR 918.

Footnote 15.

Annotation: 16 ALR 924.

§ 23 Filing of papers

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It is the official duty of the clerk of a court to file all papers in a cause presented by the parties, and to indorse the correct date of the filing thereon. 16 It is the duty of the clerk of court, in the absence of instructions from the court to the contrary, to accept for filing any paper presented to him, provided such paper is not scurrilous or obscene, is properly prepared, and is accompanied by the requisite filing fee. 17 Unless otherwise specifically authorized by statute, the duty of the clerk of court to file papers presented to him is purely ministerial 18 and he may not refuse to perform such duty except upon order of the court. 19 When the statute requires the clerk of court to file all papers delivered to him to be filed, he is not concerned with the merit of the papers nor with their effect and interpretation. 20 The clerk has no discretion in the matter of filing papers recognized by law as properly belonging in the record of causes. 21 It is not for the clerk to inquire into the purposes or contents of such papers, or into the circumstances giving rise to them or attending their preparation. 22 The power to make any decision as

to the propriety of any paper submitted, or as to the right of a person to file such paper, is vested in the court, not the clerk. 23 However, where a statute makes it the duty of the clerk of court to file a particular document, a judge is without authority to interfere with such filing. 24

To file an instrument, it must be delivered to the clerk at the office where it is required to be filed; delivery to the clerk at any other place, even though he endorses it "filed," is not sufficient. 25

The mere fact that the clerk used superfluous words in filing papers would not render his acts void. 26

§ 23 ----Filing of papers [SUPPLEMENT]

Case authorities:

Arrestee's police brutality claim will not be dismissed as time barred, where her counsel intended to file complaint early on last day before statute of limitations ran but, due to printer malfunction, he was unable to file it before clerk's office was closed so he caused it to be deposited in clerk's post office box at 11:30 p.m., because Sixth Circuit rule, supported by liberal construction of FRCP 5(e) and 77(a) and (c), seems to be that document is deemed filed when it is in actual or constructive possession of clerk. *Turner v City of Newport* (1995, ED Ky) 887 F Supp 149.

See *Nix v Frazee* (1988, Tex App Dallas) 752 SW2d 118, § 28.

Footnotes

Footnote 16. *Brinson v Georgia R. Bank & Trust Co.*, 45 Ga App 459, 165 SE 321.

Under the statute, the clerk's duties include the obligation to file all papers properly before him. *Hamilton v Department of Industry, Labor & Human Relations*, 56 Wis 2d 673, 203 NW2d 7 (ovrld on other grounds *Re Pewaukee* (Wis) 241 NW2d 603).

The acceptance of the filing of a complaint is a mere ministerial act, and the officer charged with the responsibility of receiving the same is required to accept what is tendered to him if it is accompanied by the proper fee. *State ex rel. Kaufman v Sutton* (Fla App) 231 So 2d 874.

As a ministerial officer, it is the mandatory duty of the clerk of the Court of Civil Appeals to file and forward to the Supreme Court any document tendered to him appertaining to an appeal in any cause pending in that court which is addressed to the Supreme Court. *Wagner v Garrett*, 114 Tex 362, 269 SW 1030.

A paper is filed with the clerk of court when it is delivered to him for that purpose. *Morthland v Lincoln Nat. Life Ins. Co.*, 220 Ind 692, 42 NE2d 41, reh den 220 Ind 734, 46 NE2d 203.

Footnote 17. *State ex rel. Wanamaker v Miller*, 164 Ohio St 174, 57 Ohio Ops 151, 128

NE2d 108.

The clerk may refuse to accept any paper for filing until the appropriate fee is paid. *Poetz v Mix*, 7 NJ 436, 81 A2d 741; *Hamilton v Department of Industry, Labor & Human Relations*, 56 Wis 2d 673, 203 NW2d 7 (ovrld on other grounds *Re Pewaukee* (Wis) 241 NW2d 603).

As to prepayment of fees, generally, see § 19, *supra*.

Footnote 18. *State ex rel. Dawson v Roberts*, 165 Ohio St 341, 59 Ohio Ops 436, 135 NE2d 409; *Malinou v McElroy*, 99 RI 277, 207 A2d 44.

Footnote 19. *Malinou v McElroy*, 99 RI 277, 207 A2d 44.

Footnote 20. *Corey v Carback*, 201 Md 389, 94 A2d 629.

It is not incumbent upon one who has the ministerial function of accepting the filing of a complaint to judicially determine the legal significance of the tendered document. *State ex rel. Kaufman v Sutton* (Fla App) 231 So 2d 874.

Clerks of federal courts may not refuse to file naturalization petitions which contain all the proper allegations, because of their judgment of color, race, or other qualification that the applicant may not be entitled to citizenship. *Re Halladjian* (CC Mass) 174 F 834.

It is not the duty of the clerk of court to give notice that a bill of exceptions was not signed by the judge or to find the absent judge and lay the bill before him for signing. *Haven v Ward's Estate*, 118 Vt 499, 114 A2d 413.

Footnote 21. *Bernard v Crowell* (Tex Civ App) 38 SW2d 912.

Footnote 22. *Bernard v Crowell* (Tex Civ App) 38 SW2d 912 (bystander's bill of exceptions).

Footnote 23. *State ex rel. Wanamaker v Miller*, 164 Ohio St 176, 57 Ohio Ops 151, 128 NE2d 108.

It is the duty of the clerk of the municipal court to file notice of appeal whether presented in time or not; the determination of the question whether the appeal was properly taken is the province of the Appellate Term on motion to dismiss. *People ex rel. Trost v Bird*, 184 App Div 779, 172 NYS 412.

Footnote 24. *Alexandria Naval Stores Co. v J. F. Ball Bro. Lumber Co.*, 128 La 632, 54 So 1035.

Footnote 25. *Brelsford v Community High School Dist.*, 328 Ill 27, 159 NE 237.

Footnote 26. *State v Gillette's Estate* (Tex Com App) 10 SW2d 984 (use of words "at law").

§ 24 Custody and care of records

It is the duty or function of a clerk of court to make and keep an accurate record 27 of the proceedings in his court 28 and of what the court orders and adjudges. 29 In the performance of these duties the clerk acts ministerially 30 and under the exclusive jurisdiction and direction of the court, 31 and has no power to pass on or contest the validity of any act of the court which purports to have been done in the performance of its judicial function. 32 Where required by statute the clerk must make some record of the filing of a paper presented to him, 33 keep a current general index of recorded instruments, 34 and keep a trial 35 or special proceeding docket. 36

It is the clerk's duty to carefully preserve in his office papers filed with him and not to permit their withdrawal or removal, 37 except with leave of court. 38

A retiring clerk of court must turn over to his successor in office all records, books, and property of his office. 39 While it is recognized that a clerk of court may maintain mandamus proceedings to obtain from his predecessor in office books and papers in the latter's possession belonging to the office, 40 it has been held that mandamus will not lie against a private individual acquiring possession of the records sought to be recovered, though possession was obtained under a pretended claim to the office of clerk, where no de jure or de facto status was accorded to the claimant. 41

It is the ordinary duty of the clerk of a court of record to extend the records of the court from the processes and pleadings on file, and he cannot resort to extrinsic evidence for that purpose. 42 He has the right to regard as correct, the entries made and the processes issued by his predecessors, and if, from the inaccuracy of his predecessors, errors are found in the records as extended by the incumbent clerk, the fault is not his. 43 He has only the powers incident to his duties as custodian of the records, and consequently he has no authority to make alterations therein. 44 In fact, he cannot alter the record of his own acts, since the making of the record has exhausted his authority, and his only remaining powers are to keep and preserve the record safely. 45 It is the province of the court alone to correct clerical errors, to effect the restoration of papers which have been improperly altered or defaced, and to provide for the substitution of new ones when the originals are lost or stolen. 46

The clerk, as custodian of the records, is subject to the general rules governing custodians of public records with respect to the rights of abstracters and members of the public generally to inspect or copy. 47

Footnotes

Footnote 27. *State v Ruckerfeller*, 9 Ariz App 265, 451 P2d 623, cert den 396 US 920, 24 L Ed 2d 199, 90 S Ct 247; *Long v Sphaler*, 89 Fla 499, 105 So 101; *Brelsford v Community High School Dist.*, 328 Ill 27, 159 NE 237; *State v Furry*, 252 Ind 486, 250 NE2d 590; *Bush v Bush*, 158 Kan 760, 150 P2d 168; *McKay v Coolidge*, 218 Mass 65, 105 NE 455; *State ex rel. Caldwell v Cockrell*, 280 Mo 269, 217 SW 524; *People ex rel. Harris v Lindsay*, 21 App Div 2d 102, 248 NYS2d 691, affd 15 NY2d 751, 257 NYS2d

176, 205 NE2d 312; State ex rel. Journal Co. v County Court for Racine County, 43 Wis 2d 297, 168 NW2d 836.

The court will take judicial notice that the clerk of court is the legal custodian of the records in his office. Maroon v Immigration & Naturalization Service (CA8) 364 F2d 982, 2 ALR Fed 292.

Footnote 28. State v Rockerfeller, 9 Ariz App 265, 451 P2d 623, cert den 396 US 920, 24 L Ed 2d 199, 90 S Ct 247; Robertson & Wilson Scale & Supply Co. v Richman, 212 Mich 334, 180 NW 470; State ex rel. Morris Bldg. & Inv. Co. v Brown, 228 Mo App 760, 72 SW2d 859; Foglio v Alvis (CP) 75 Ohio L Abs 228, 143 NE2d 641.

Footnote 29. State v Rockerfeller, 9 Ariz App 265, 451 P2d 623, cert den 396 US 920, 24 L Ed 2d 199, 90 S Ct 247; Henderson v Freeman, 205 Ark 856, 171 SW2d 66; Stanton v Arkansas Democrat Co., 194 Ark 135, 106 SW2d 584; Bush v Bush, 158 Kan 760, 150 P2d 168; Foglio v Alvis (CP) 75 Ohio L Abs 228, 143 NE2d 641; Commonwealth use of Orris v Roberts, 183 Pa Super 204, 130 A2d 226, revd on other grounds 392 Pa 572, 141 A2d 393, 71 ALR2d 1124; Humphrey v Mauzy, 155 W Va 89, 181 SE2d 329.

A prothonotary has an absolute statutory duty to properly index all judgments and his failure to do so renders him liable on his bond. Commonwealth use of Orris v Roberts, *supra*.

Footnote 30. State ex rel. Druissi v Almand (Fla) 75 So 2d 905; People ex rel. Pardridge v Windes, 275 Ill 108, 113 NE 949; State ex rel. Caldwell v Cockrell, 280 Mo 269, 217 SW 524; Barrett v Barrett, 207 Okla 234, 249 P2d 88.

Footnote 31. People ex rel. Pardridge v Windes, 275 Ill 108, 113 NE 949; Barrett v Barrett, 207 Okla 234, 249 P2d 88.

Footnote 32. State ex rel. Druissi v Almand (Fla) 75 So 2d 905.

Footnote 33. State v Brubaker, 352 Mo 414, 177 SW2d 623.

Footnote 34. Land v Lewis, 299 Ky 866, 186 SW2d 803, 159 ALR 601 (clerk not required to go back prior to his term of office and make up general index which should have been but was not kept up currently).

Footnote 35. Little v Employer's Casualty Co. 180 Okla 628, 71 P2d 687.

Footnote 36. State Trust Co. v Toms, 244 NC 645, 94 SE2d 806.

Footnote 37. Brelsford v Community High School Dist., 328 Ill 27, 159 NE 237; Ohio Farmers Co-op. Milk Ass'n v Davis, 59 Ohio App 329, 13 Ohio Ops 116, 25 Ohio L Abs 551, 17 NE2d 924.

Footnote 38. All papers in a cause should be preserved by the clerk and should not be taken from the office except with leave of court. Brelsford v Community High School Dist., *supra*.

Footnote 39. Underwood v Watson, 223 NC 437, 27 SE2d 144.

Footnote 40. See *State ex rel. Wells v Cline*, 29 Okla 157, 116 P 767 (by implication).

Footnote 41. *State ex rel. Wells v Cline*, 29 Okla 157, 116 P 767, where the relator alleged that ever since the organization of the court he had been the de jure and de facto clerk.

Footnote 42. *Frink v Frink*, 43 NH 508.

Footnote 43. *Frink v Frink*, *supra*.

Footnote 44. *Frink v Frink*, 43 NH 508.

The duties of a clerk will vary with the nature of the court and its requirements; thus, in the Supreme Court of the United States, which exercises an almost entirely appellate jurisdiction, the copies of the record of the case are an essential part of the procedure, and the clerk is responsible to the court for the correctness and proper indexing of the printed copies of the record, for their presentation to the justices in the form and size prescribed by the rules, and for their delivery to the parties entitled thereto. *Bean v Patterson*, 110 US 401, 28 L Ed 190, 4 S Ct 23. Such a duty would rarely be performed by the clerk of a trial court.

Footnote 45. *Elliott v Lessee of Peirsol*, 26 US 328, 7 L Ed 164.

Footnote 46. *Lewis v Ross*, 37 Me 230; *Frink v Frink*, 43 NH 508; *Remick v Butterfield*, 31 NH 70; *Chichester v Cande* (NY) 3 Cow 39; *Hollister v Judges of Dist. Court*, 8 Ohio St 201.

Even the court cannot direct the alteration of a true record of what has been said or done, even though perjured testimony is a part thereof. *Coppock v Reed*, 189 Iowa 581, 178 NW 382, 10 ALR 1407.

Footnote 47. See 1 Am Jur 2d, *Abstracts of Title* §§ 8-11; 66 Am Jur 2d, *Records and Recording Laws* §§ 19 et seq.

Enforcement of right of inspection by mandamus, see § 37, *infra*.

§ 25 Searching and certifying records

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Ordinarily it is the power and duty of a clerk of court to attest and certify the records of his court, 48 but his certificate is not evidence of any fact beyond that which the law requires him to certify. 49 Moreover, the clerk is not required to certify an instrument that does not conform to the records in his office, 50 since the clerk has authority only to certify the records in his office. 51 The clerk is presumed to have authority to make, certify, and authenticate copies of the records in his keeping, 52 subject, as to their use

and inspection, to the general authority of the court. 53

Sometimes a clerk as an official having custody of public records is under a statutory duty to make searches and certify results, 54 but where there is no law imposing the duty such services are held not part of his official duties. 55

Footnotes

Footnote 48. *Maroon v Immigration & Naturalization Service* (CA8) 364 F2d 982, 2 ALR Fed 292; *Re Nakanishi*, 19 Cal App 552, 126 P 508; *People ex rel. Harris v Lindsay*, 21 App Div 2d 102, 248 NYS2d 691, affd 15 NY2d 751, 257 NYS2d 176, 205 NE2d 312; *Kelly Moore Paint Co. v Northeast Nat. Bank* (Tex Civ App) 426 SW2d 591 (stating that it is one of the official duties of the clerk to know what his office records show with respect to pending litigation); *Slater v Commonwealth*, 182 Va 579, 29 SE2d 853.

Practice Aids: –Forms of clerk's certificate. 5 Am Jur Pl & Pr Forms (Rev Ed), Clerks of Court Forms 5 et seq.

–Form of certificate authenticating copies of recorded documents. 4 Am Jur Legal Forms 2d, Clerks of Court § 58:14.

–Form of authentication of pleading. 4 Am Jur Legal Forms 2d, Clerks of Court § 58:15.

–Form of certification of judge's signature. 4 Am Jur Legal Forms 2d, Clerks of Court § 58:16.

Footnote 49. *Farmers State Bank v Investors Guaranty Corp.*, 48 Wyo 319, 45 P2d 1057.

Footnote 50. *Touchton v Echols County*, 211 Ga 85, 84 SE2d 81.

Footnote 51. *Strickfadden v Greencreek Highway Dist.*, 44 Idaho 751, 260 P 431.

Footnote 52. *Gunn v Peakes*, 36 Minn 177, 30 NW 466.

Footnote 53. *Houston v Williams*, 13 Cal 24; *Belt v Prince George's County Abstract Co.*, 73 Md 289, 20 A 982; *Re Caswell*, 18 RI 835, 29 A 259.

Footnote 54. *Mallory v Ferguson*, 50 Kan 685, 32 P 410.

Upon tender of the fees prescribed by law, the clerk is required to search the records in his custody, upon request of any person engaged in the business of making abstracts of title and certify and deliver transcripts of judgments entered upon his docket, and the fact that the abstracter intends to use the information in his business is immaterial. *State ex rel. Van Dyke v Scow*, 93 Minn 11, 100 NW 382.

Footnote 55. *Mallory v Ferguson*, 50 Kan 685, 32 P 410; *Board of Com'rs v Bumpass*, 233 NC 190, 63 SE2d 144.

Where no official duty exists, liability for error or misstatement in certificate cannot be predicated on basis of breach of ministerial duty. *Mallory v Ferguson*, supra.

The clerk of court is not required to search his files to ascertain whether there is some pleading of record which might supplement a defective affidavit for service by publication. *Board of Com'rs v Bumpass*, supra.

§ 26 Custody and care of funds

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A clerk of court generally holds funds paid into court in his official capacity as bailee, ⁵⁶ or as trustee, ⁵⁷ and his duties respecting such funds are those of a fiduciary. ⁵⁸ He is sometimes authorized by statute to collect fines, penalties, and forfeitures, ⁵⁹ to collect costs and fees taxed in judicial proceedings, ⁶⁰ such as the exaction of advance or accrued costs from plaintiff, ⁶¹ to receive cash deposits in lieu of bail or recognizance, ⁶² or to collect and receive jury and witness fees. ⁶³ By virtue of a federal statute, clerks of state courts are authorized to collect and account for naturalization fees. ⁶⁴

When the clerk receives a fund in his official capacity, his possession is that of the court ⁶⁵ and subject to control by the court, ⁶⁶ whose orders with respect to the fund the clerk must obey. ⁶⁷ The clerk of court has the right to deposit funds deposited with him under order of court with banks in his name as clerk. ⁶⁸

The federal statutes provide that all moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court shall be forthwith deposited with the Treasurer of the United States or a designated depository, in the name and credit of such court, ⁶⁹ and that there shall be no withdrawal except by order of court. ⁷⁰ Under such statutes, it is the duty of the clerk of court to deposit forthwith the amount of the judgment paid by a defendant against whom such judgment has been recovered, regardless of the fact that the money so paid was immediately levied on under a writ issued out of a state court. ⁷¹

In the absence of statute requiring it, there is no obligation upon the clerk of court to invest any custodial funds in interest-bearing accounts or securities. ⁷² With respect to the authorized investment of funds received by him in his official character, the clerk is not considered a trustee in the sense that he is subject to constitutional and statutory provisions regulating investments by trustees. He is an agent of the court, and as such is subject to the court's direction. ⁷³

A retiring clerk must turn over to his successor in office all moneys and property of his office. ⁷⁴

Footnotes

Footnote 56. *Puckett v Chambers*, 66 Ga App 513, 18 SE2d 20, affd 194 Ga 401, 21

SE2d 713; *DeLong v Mason*, 183 Okla 528, 83 P2d 547.

Footnote 57. *Fidelity & Deposit Co. v Rankin*, 33 Okla 7, 124 P 71; *Steinberg v Cox*, 24 Tenn App 340, 144 SW2d 12.

Money paid to a clerk of court pursuant to an order or judgment of the court is received by the clerk in his official capacity. *Webber v Scottsbluff*, 155 Neb 48, 50 NW2d 533.

Footnote 58. *Steinberg v Cox*, 24 Tenn App 340, 144 SW2d 12.

Footnote 59. *Ivester v Mozeley*, 89 Ga App 578, 80 SE2d 197; *Hoyne v Danisch*, 264 Ill 467, 106 NE 341; *State ex rel. Butler County Bar Library Ass'n v Kempf*, 51 Ohio App 452, 5 Ohio Ops 414, 19 Ohio L Abs 596, 1 NE2d 951.

Footnote 60. *State ex rel. McCormick v Fishback*, 102 Kan 178, 171 P 348.

Footnote 61. *Hotel Donaldson Co. v Anderson Hotels of Louisiana, Inc.* (La App) 75 So 2d 884.

Footnote 62. *Distributive, etc., Workers Union v McKague* (DC Pa) 115 F Supp 227, app dismd (CA3 Pa) 216 F2d 153.

Footnote 63. *Adams v People*, 25 Colo 532, 55 P 806.

Footnote 64. § 18, *supra*.

Footnote 65. *Mundell v Wells*, 181 Cal 398, 184 P 666, 7 ALR 383; *Citizens State Bank v Goebel*, 292 Ill App 95, 10 NE2d 828; *Webber v Scottsbluff*, 155 Neb 48, 50 NW2d 533; *Lamb v Lanzarone*, 195 Va 1038, 81 SE2d 760.

Unsegregated bank deposits in the name of a clerk of courts of a certain county, held by the clerk pending the outcome of litigation to be paid to litigants on termination of litigation and on order of court, belong to the county. *First Nat. Bank v Bowers*, 104 Ohio App 495, 5 Ohio Ops 2d 232, 150 NE2d 459.

Footnote 66. *Union Bank & Trust Co. v County of Los Angeles*, 2 Cal App 2d 600, 38 P2d 442 (ovrld on other grounds *Minsky v Los Angeles*, 11 Cal 3d 113, 113 Cal Rptr 102, 520 P2d 726); *Citizens State Bank v Goebel*, 292 Ill App 95, 10 NE2d 828.

Footnote 67. *Mundell v Wells*, 181 Cal 398, 184 P 666, 7 ALR 383.

Footnote 68. *State ex rel. Ridge v Shoemaker*, 278 Mo 138, 212 SW 1.

Footnote 69. 28 USCS § 2041.

Footnote 70. 28 USCS § 2042.

Footnote 71. *D. B. Martin v Shannonhouse* (DC NC) 203 F 517.

Footnote 72. *Potter v County of Wayne*, 46 Mich App 174, 207 NW2d 448.

Footnote 73. *Shelley v Thomas*, 232 Ala 227, 167 So 316.

The duties of the clerk with respect to money paid into court are purely ministerial. He acquires no individual interest therein and has no authority to substitute as a depositary one other than that designated by the court. *Puckett v Walker*, 194 Ga 401, 21 SE2d 713.

Practice Aids: –Forms pertaining to order directing clerk to add interest to judgment. 5 Am Jur Pl & Pr Forms (Rev Ed), Clerks of Court Forms 2-4.

Footnote 74. *Underwood v Watson*, 223 NC 437, 27 SE2d 144.

§ 27 Effect of breach of duty on rights of litigants

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Those dealing with the clerk of a court concerning an action or matter then pending have a right to expect that he will perform the ministerial duties connected with his office, and his neglect or failure to do so should not prejudice their rights. 75 This principle has been frequently applied in cases where a party seeks relief from a judgment rendered against him by reason of some mistake or default of the clerk. 76 However, where no duty exists, 77 or where the negligence of the attorney or suitor intervenes, 78 relief will be denied them, even where they relied on promises or statements of the clerk, 79 or where the clerk failed to answer letters of inquiry about the status of the case and judgment was rendered without their knowledge. 80

It may be noted here that the improvident exercise of authority by the clerk, as where an order of sale is issued by him without the direction of the party entitled thereto, may not prejudice the rights of innocent purchasers. 81 But where a writ of assistance is granted by the clerk, without action of the court, to the holder of a sheriff's deed on a mortgage foreclosure, the writ is void and should be vacated on direct attack. 82

A clerk of court is, generally speaking, liable personally and on his official bond to a litigant injured as a result of his negligence or misconduct. 83

Footnotes

Footnote 75. *Williams v Tyler*, 14 Ala App 591, 71 So 51, cert den 198 Ala 696, 73 So 1002; *Hogs Back Consol. Mining Co. v New Basil Consol. Gravel Mining Co.* 65 Cal 22, 2 P 489; *Silverman v Childs*, 107 Ill App 522; *May v Wolvington*, 69 Md 117, 14 A 706; *Thompson v Sharp*, 17 Neb 69, 22 NW 78; *Hopkins v Niggli (Tex)* 6 SW 625; *Black v Hurlbut*, 73 Wis 126, 40 NW 673.

Footnote 76. *Ivester v Mozeley*, 89 Ga App 578, 80 SE2d 197.

Annotation: 164 ALR 552 et seq., § III.

Failure of the clerk to notify an appellant of completion of the transcript is good cause

for refusing to dismiss an appeal on the ground that a certified copy of the judgment and the granting of the appeal was not filed in the appellate court by the clerk, in the time required by statute, particularly where the clerk affirmatively stated that illness of a deputy and rush of business had prevented him from completing the transcript in time to file it. *Parks v Marshall*, 322 Mo 218, 14 SW2d 590, 62 ALR 835.

Footnote 77. *Trala v Melmar Industries, Inc.* (Del) 254 A2d 249; *Western Union Tel. Co. v Griffin*, 1 Ind App 46, 27 NE 113; *Jackson v Jones* (Ky) 336 SW2d 565; *Valley Finance Co. v Campana*, 112 Ohio App 405, 13 Ohio Ops 2d 472, 83 Ohio L Abs 577, 167 NE2d 654, motion overr.

Footnote 78. *Western Union Tel. Co. v Griffin*, 1 Ind App 46, 27 NE 113.

Footnote 79. *Bernier v Schaefer*, 11 Ill 2d 525, 144 NE2d 577; *Libert v Turzynski*, 129 Ill App 2d 146, 262 NE2d 741 (deputy clerk); *Western Union Tel. Co. v Griffin*, supra.

A clerk of court is not liable, because a party relied upon his gratuitous advice on a matter having no relation to the duties of his office. *Trala v Melmar Industries, Inc.* (Del) 254 A2d 249.

Footnote 80. *Williams v Wescott*, 77 Iowa 332, 42 NW 314; *First Nat. Bank v Wentworth*, 28 Kan 183; *Ganzer v Schiffbauer*, 40 Neb 633, 59 NW 98; *Pulaski Oil Co. v Conner*, 62 Okla 211, 162 P 464.

Footnote 81. *Sowles v Harvey*, 20 Ind 217, plaintiff obtaining judgment in mortgage foreclosure proceeding may not set aside sheriff's sale by reason of clerk's unauthorized issue of order of sale on judgment.

Footnote 82. *Williams v Sherman*, 35 Idaho 169, 205 P 259, 21 ALR 353, wherein a motion to vacate writ on the ground that it was granted by the clerk without notice was held to be a direct, not a collateral, attack.

Footnote 83. §§ 28 et seq., infra.

VI. LIABILITIES AND REMEDIES

§ 28 Negligence or misconduct

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The principle that a public officer should be held to a faithful performance of his official duties and made to answer in damages to all persons who may have been injured through his malfeasance, omission, or neglect⁸⁴ applies to the negligence, carelessness, or misconduct of a clerk of court.⁸⁵ As a public ministerial officer, the clerk is answerable

for any act of negligence or misconduct in office resulting in injury to the complaining party. 86 In order to render the clerk of court and the sureties on his official bond liable for the clerk's misfeasance, both a breach of duty and consequent damage must be shown. 87 Moreover, to warrant relief, the wrong and the resulting injury must concur; the clerk's misconduct or negligence must be the direct and proximate cause of the injury. 88 If the injury would have followed notwithstanding the misconduct, or if the injured party contributed to the result in any degree by his own fault or neglect or that of his attorney, he has no legal ground of complaint and the clerk cannot be held responsible. 89

Under applicable statutory provisions, a clerk of court may be held liable on his bond for failure to issue a writ, citation, or process; 90 for the improper issuance of letters of guardianship whereby an unauthorized person was able legally to procure funds of another and squander them; 91 for negligence or misconduct in issuing a warrant of arrest; 92 for failure properly to docket a judgment; 93 for failure to properly index a judgment; 94 for failure to enter an attachment within the time fixed by law; 95 for failure to tax costs; 96 for failure to include a judgment on a mortgage certificate furnished in connection with a partition sale; 97 for failure to reject a surety bond executed by a person ineligible to act as surety under the statute; 98 for not requiring a surety to qualify upon a bond executed by him as such surety; 99 or for failure properly to keep records of a case and for informing the court inaccurately of its status. 1

In those jurisdictions where a clerk of court serves also as recorder of deeds and mortgages, breach of his duties as a recording officer may give rise to an action on his official bond as clerk, 2 such as his failure to record an instrument lodged with him for recording. 3

On the other hand, the principle of judicial immunity from liability extends to a clerk of court in the performance of his judicial or quasi-judicial functions, 4 as distinguished from his ministerial functions. 5 He may not be held liable for errors of judgment committed by him while acting lawfully in a judicial or quasi-judicial capacity, 6 whether in or out of term time. 7 Moreover, a clerk of court is not liable where he is acting pursuant to an order of the court. 8

The clerk cannot be held liable when acting in a ministerial capacity for errors made in spite of the exercise of reasonable care and skill in an effort to avoid them. 9 Nor is he liable in his official capacity for error of judgment or want of skill in matters disconnected with the duties of his office. 10

§ 28 ----Negligence or misconduct [SUPPLEMENT]

Practice Aids: Applicability of judicial immunity to acts of clerk of court under state law, 34 ALR4th 1186.

Case authorities:

A county clerk of court did not have sovereign immunity against an action for indemnity by a title insurance company where the an employee of the clerk's office improperly indexed a document which affected the title to a parcel of real estate because the clerk had a statutory duty to properly record and index documents in the public records and public policy considerations favor accountability by the clerk for negligence. First American Title Ins. Co. v Dixon (1992, Fla App D4) 603 So 2d 562, 17 FLW D 1708,

review den (Fla) 613 So 2d 3.

Sovereign immunity did not protect state from liability for failure of county clerk to timely docket judgment since act of recording judgment was not discretionary. *National Westminster Bank v State* (1989, 1st Dept) 155 AD2d 261, 546 NYS2d 864, app gr 75 NY2d 706, 552 NYS2d 929, 552 NE2d 177 and affd 76 NY2d 507, 561 NYS2d 541, 562 NE2d 866.

A clerk of court is liable in a civil action for a negligent omission to perform a statutory duty which proximately causes injury to another, unless the injured party was contributorily negligent. *Maddox v Astro Invest.*, 45 Ohio App 2d 203, 74 Ohio Ops 2d 312, 343 NE2d 133.

The failure of the clerk of the Court of Common Pleas to docket and index a certificate of judgment for several days after it is delivered and filed constitutes negligence. *Maddox v Astro Invest.*, 45 Ohio App 2d 203, 74 Ohio Ops 2d 312, 343 NE2d 133.

Summary judgment was properly granted the district clerk in a suit seeking to hold her liable in damages for the dismissal of plaintiff's appeal from a summary judgment entered against him in a prior cause though plaintiff had requested that the clerk forward the transcript relating to that cause to the court of appeals on three occasions and there was nothing in the record to show why she failed to transmit the record until over five months after plaintiff first requested her to do so, since even if the district clerk failed to transmit the record within the proper time period, the primary responsibility to place the record before the court of appeals nonetheless remained with plaintiff, and it was his failure to request an extension of time from the court of appeals pursuant to RCP Rule 21c that rendered the filing of the transcript untimely. *Nix v Frazee* (1988, Tex App Dallas) 752 SW2d 118.

Footnotes

Footnote 84. See 63 Am Jur 2d, Public Officers and Employees §§ 287 et seq.

Footnote 85. *Lick v Madden*, 36 Cal 208.

A conviction for misconduct in office in the illegal appropriation of public funds and the clerk's removal from office are equivalent to an adjudication that the clerk is ineligible to hold the office for the remainder of the term. *McCellan v Pearson*, 163 Ga 492, 136 SE 429.

Footnote 86. *Eslava v Jones*, 83 Ala 139, 3 So 317; *Stewart v Sholl*, 99 Ga 534, 26 SE 757; *Stine v Shuttle*, 134 Ind App 67, 186 NE2d 168; *Selover v Sheardown*, 73 Minn 393, 76 NW 50; *State ex rel. St. Louis v Priest*, 348 Mo 37, 152 SW2d 109.

Clerks of the Superior Court are no less liable for the negligent performance of their official duties than for a failure to perform such duties. *Touchton v Echols County*, 211 Ga 85, 84 SE2d 81.

Footnote 87. *Neal-Blun Co. v Rogers*, 141 Ga 808, 82 SE 280.

There is no liability if the clerk's failure to perform his duty resulted in no injury or loss. *Installment Plan, Inc. v Justice* (La App) 209 So 2d 68.

Footnote 88. *Eslava v Jones*, 83 Ala 139, 3 So 317; *Installment Plan, Inc. v Justice* (La App) 209 So 2d 68; *Selover v Sheardown*, 73 Minn 393, 76 NW 50; *State ex rel. St. Louis v Priest*, 348 Mo 37, 152 SW2d 109.

Footnote 89. *Lick v Madden*, 36 Cal 208; *Installment Plan, Inc. v Justice* (La App) 209 So 2d 68.

Footnote 90. *Steele v Thompson*, 62 Ala 323; *Kimsey v Hall*, 68 Ga App 409, 23 SE2d 196.

The failure of the clerk of court to sign the process attached to the petition, and the copy of the process, authorized recovery of nominal damages where the claim sued on became barred because of the clerk's negligence. *Hall v Kimsey*, 48 Ga App 605, 173 SE 437.

Footnote 91. *State ex rel. Cecil v Christian*, 13 Ind App 308, 41 NE 603.

Where letters of guardianship confer no power on the guardian until a bond is given, the issuance by a clerk of such letters before the guardian gives bond does not constitute a breach of the clerk's bond. *State use of Carpenter v Sloane*, 20 Ohio 327.

Footnote 92. *Stine v Shuttle*, 134 Ind App 67, 186 NE2d 168, holding that the clerk of court was liable in damages for false arrest based on his negligence or misconduct in issuing a warrant of arrest.

Footnote 93. *Ryan v State Bank of Nebraska*, 10 Neb 524, 7 NW 276; *Charco, Inc. v Cohn*, 242 Or 566, 411 P2d 264 (failure to enter order vacating award for damages); *Strain v Babb*, 30 SC 342, 9 SE 271.

Failure of a former county clerk to docket a divorce decree so as to impose a lien on the husband's real estate gave rise to a cause of action against the clerk on the ground that such failure was the proximate cause of the wife's loss occasioned when the husband mortgaged the real estate. *Esselstyn v Casteel*, 205 Or 344, 286 P2d 665, mod on other grounds 205 Or 369, 288 P2d 214, and reh den 205 Or 371, 288 P2d 215.

Specific statutory provision is sometimes made under which a clerk neglecting to enter any judgment on the judgment docket is liable personally on his official bond for the amount of damages sustained by such neglect. See, for example, provisions set out in *Johnson v Schloesser*, 146 Ind 509, 45 NE 702.

Footnote 94. *Shackelford v Staton*, 117 NC 73, 23 SE 101.

A prothonotary has an absolute statutory duty to properly index all judgments and his failure to do so renders him liable on his bond. *Commonwealth use of Orris v Roberts*, 183 Pa Super 204, 130 A2d 226, revd on other grounds 392 Pa 572, 141 A2d 393, 71 ALR2d 1124.

Footnote 95. *Stewart v Sholl*, 99 Ga 534, 26 SE 757.

Footnote 96. *State ex rel. Christian County v Gideon*, 158 Mo 327, 59 SW 99.

Footnote 97. Landreneau v Ceasar (La App) 153 So 2d 145, cert den 244 La 901, 154 So 2d 769, and (disapproved on other grounds United States Fidelity & Guaranty Co. v Green, 252 La 227, 210 So 2d 328, ovrl'd on other grounds Creech v Capitol Mack, Inc. (La) 287 So 2d 497, later app (La App) 296 So 2d 387, cert den (La) 299 So 2d 802).

Footnote 98. People v May, 251 Ill 54, 95 NE 999, error dismd 232 US 720, 58 L Ed 814, 34 S Ct 602.

Footnote 99. People use of Gobin v May, 133 Ill App 139, holding that clerk's act in accepting insufficient surety was judicial or quasi-judicial where court referred question of approval of sureties on appeal bond to clerk.

Footnote 1. McKay v Coolidge, 218 Mass 65, 105 NE 455.

Footnote 2. Luther v Banks, 111 Ga 374, 36 SE 826; Fisher v Levy, 180 La 195, 156 So 220, 94 ALR 1297 (wrongful issuance of mortgage certificate).

Annotation: 94 ALR 1303, I.

Footnote 3. Neal-Blum Co. v Rogers, 141 Ga 808, 82 SE 280 (materialman's claim of lien); Cain v Gray, 146 Ky 402, 142 SW 715 (deed).

Footnote 4. Davis v McAteer (CA8 Mo) 431 F2d 81; Lockhart v Hoenstine (CA3 Pa) 411 F2d 455, cert den 396 US 941, 24 L Ed 2d 244, 90 S Ct 378; Brown v Dunne (CA7 Ill) 409 F2d 341; Niklaus v Simmons (DC Neb) 196 F Supp 691.

Court clerk refusing to give the plaintiff a transcript of record was acting in discharge of his official duties and immune from liability under the doctrine of judicial immunity. Dieu v Norton (CA7 Ill) 411 F2d 761.

Charge that clerk of court refused to furnish the plaintiff with a portion of the state criminal trial transcript involved an act performed in his capacity as a quasi-judicial officer and clothed him with judicial immunity. Stewart v Minnick (CA9 Cal) 409 F2d 826.

See, however, Stephen v Drew (DC Va) 359 F Supp 746, involving an action against a clerk of court and others for wrongful commitment of the plaintiff for mental illness, wherein the court stated that, although some decisions have articulated a "quasi-judicial" immunity of clerks of court, clerks of court enjoy no immunity at all.

Footnote 5. There is no immunity from suit for clerks of court in the performance of their ministerial duties, such as the filing of papers. McCray v Maryland (CA4 Md) 456 F2d 1.

Footnote 6. Commonwealth use of Green v Johnson, 123 Ky 437, 96 SW 801.

A county clerk of court is protected from the consequences of his acts which are quasi-judicial in nature and require the exercise of judgment or discretion. Rodriguez v State, 55 Misc 2d 669, 285 NYS2d 896.

Footnote 7. *McAlister's Admrs. v Scrice*, 15 Tenn 276.

Footnote 8. Prothonotary was not liable to prisoner under the Civil Rights Act for refusing to accept certain appeal papers for filing where action of the prothonotary was pursuant to order of the superior court. *Lockhart v Hoenstine* (CA3 Pa) 411 F2d 455, cert den 396 US 941, 24 L Ed 2d 244, 90 S Ct 378.

Acting pursuant to order of court as defense to action, see § 38, *infra*.

Footnote 9. *Commonwealth use of Green v Johnson*, 123 Ky 437, 96 SW 801.

Footnote 10. It is no part of the official duties of a clerk to search the records of his office for judgments, liens, or suits pending, affecting title to real property, and to certify the result. A party relying on such certificate, in absence of a special agreement by the clerk to make a special search and certify as to the condition of the title, must himself bear whatever loss ensues from want of skill or honest errors on the part of the clerk. *Mallory v Ferguson*, 50 Kan 685, 32 P 410.

§ 29 Approving insufficient bond

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Where a clerk of court is by statute required to approve bonds given in the course of judicial proceedings or by officers such as executors and guardians, he is bound to use due diligence in the performance of that duty. If he is negligent, the fact that in determining the sufficiency of sureties the clerk in some cases is considered to act quasi-judicially, or that in the particular case he approved the bond in good faith, cannot affect his liability or that of his sureties. 11 A clerk whose negligence in accepting a bond with insufficient sureties causes damages may be held liable personally 12 and on his official bond. 13 But proof of negligence alone is not sufficient to warrant recovery; there must in addition be sufficient evidence of a pecuniary injury. 14 Moreover, a right of action against a clerk of court for acceptance of an insolvent or insufficient surety upon a bond does not accrue until a judgment is rendered on the bond. 15

The clerk is not an insurer of a bond which he has examined and approved in his official capacity, 16 but is required only to use ordinary care in determining whether it is sufficient in form and is signed by sufficient sureties. 17 Whether he made proper investigation and was justified in approving the bond is necessarily a question of fact. 18

Where a clerk of court is required by law to pass on the sufficiency of the sureties on an appeal bond, his act in negligently approving a nonresident or improper surety is a breach of official duty. 19 Thus, it is a breach of official duty for the clerk to approve a nonresident as the sole surety on an appeal bond, even though the statute may not expressly require the surety to be a resident; and the clerk cannot avoid liability on his bond for approving such a surety on the ground that his act in approving the bond was judicial. 20

§ 29 ----Approving insufficient bond [SUPPLEMENT]

Practice Aids: Applicability of judicial immunity to acts of clerk of court under state law, 34 ALR4th 1186.

Footnotes

Footnote 11. Spain v Clements, 63 Ga 786; Marshall Field & Co. v Wallace, 89 Iowa 597, 57 NW 303; McNutt v Livingston, 15 Miss 641; Heater v Pearce, 59 Neb 583, 81 NW 615; State ex rel. Topping v Windley, 99 NC 4, 5 SE 14.

Where a surety bond was filed with an assistant clerk during the absence of the clerk because of illness, the fact that it was merely filed and not approved by him is a factor to consider in determining whether the statutory presumption of validity raised by filing of the bond was overcome. Buttolph v Postville, 230 Iowa 89, 296 NW 817.

Footnote 12. People use of Gobin v May, 133 Ill App 139; Bengé v Foster (Tex Civ App) 47 SW2d 862, error ref.

Footnote 13. Marshall Field & Co. v Wallace, 89 Iowa 597, 57 NW 303; Bengé v Foster (Tex Civ App) 47 SW2d 862, error ref.

Footnote 14. Davis v Hale, 155 Miss 309, 124 So 370; Bengé v Foster (Tex Civ App) 74 SW2d 542, error ref.

Footnote 15. Atlas Supply Co. v United States Fidelity & Guaranty Co., 119 Ga App 152, 166 SE2d 624.

Footnote 16. Atlas Supply Co. v United States Fidelity & Guaranty Co., supra; Bengé v Foster (Tex Civ App) 47 SW2d 862, error ref.

Footnote 17. Santee River Co. v Webster, 23 RI 599, 51 A 218.

The clerk of court is not an insurer or guarantor of the solvency or sufficiency of the sureties accepted by him on bonds; his duty and responsibility in this regard is limited to the exercise of due care and diligence in determining the solvency and sufficiency of such sureties. Atlas Supply Co. v United States Fidelity & Guaranty Co., 126 Ga App 483, 191 SE2d 103.

Footnote 18. Bengé v Foster (Tex Civ App) 47 SW2d 862, error ref.

Footnote 19. People use of Gobin v May, 198 Ill App 625, affd 276 Ill 332, 114 NE 685.

Footnote 20. People v May, 251 Ill 54, 95 NE 999, error dismd 232 US 720, 58 L Ed 814, 34 S Ct 602.

§ 30 Liability for money received

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Generally, a clerk of court and the sureties on his official bond are liable for any loss resulting from his default with regard to money paid into court and legally received by him. 21 This rule has been followed with regard to proceeds from the sale of property under the jurisdiction of the court, received by the clerk pursuant to an order of the court, 22 as where the proceeds of partition 23 or foreclosure 24 sales are paid over to the clerk under direction of the court. The general rule has also been adopted in some jurisdictions with regard to money paid into court as tender, 25 money paid into court pending litigation, 26 funds received from administrators of estates, 27 and money paid to secure costs. 28 The same general principle applies where the clerk is authorized to receive money in payment of a judgment. When he does so, he and the sureties on his bond are liable for any loss resulting from his default with regard to such money. 29 The clerk and the sureties on his official bond are likewise liable for any loss resulting from the clerk's default with regard to money paid into his hands as fees, costs, fines, or taxes, where he is authorized to receive such money. 30 Under a federal statute, authorizing clerks of state courts to collect and account for naturalization fees, the clerk of a state court and the surety on his bond are liable to the United States for naturalization fees collected in such clerk's official capacity. 31 However, money received by a clerk while acting as a receiver or special commissioner under appointment by the court is ordinarily not received by virtue of his office as clerk, but by virtue of his special capacity as receiver or commissioner, although in at least one jurisdiction such money is regarded as being received by the clerk in his official capacity as such, and he and the sureties on his bond are liable for any loss resulting from his default with regard thereto. 32

After disposition of funds in accordance with the orders of the court, the clerk is not liable, even for costs, whether or not such disposition was in fact in accordance with law. 33

Footnotes

Footnote 21. *Martin v Bogard*, 176 Ark 203, 2 SW2d 700; *Wilson v People*, 19 Colo 199, 34 P 944; *Ivester v Mozeley*, 89 Ga App 578, 80 SE2d 197; *Rhea v Brewster*, 130 Iowa 729, 107 NW 940; *Northern P. R. Co. v Owens*, 86 Minn 188, 90 NW 371; *Smith v Patton*, 131 NC 396, 42 SE 849; *State v Stockton*, 38 Tenn App 90, 270 SW2d 586; *State v American Surety Co.*, 22 Tenn App 197, 120 SW2d 967.

Annotation: 59 ALR 60, 61, II.

A clerk of a court of the United States who fails to deposit as required by law, and appropriates to his own use, money deposited with him by a private suitor with the sanction of the court in a pending cause, is liable for the amount so appropriated on the statutory bond given by him. *Howard v United States*, 184 US 676, 46 L Ed 754, 22 S Ct 543.

The sureties on the clerk's bond are not liable for a fictitious credit given the clerk on the books of a bank, based on his deposit of a check which was never paid, since the bond is liable only for money received by the clerk by virtue of his office. *Newton Burial Park v Davis* (Mo App) 78 SW2d 150.

Footnote 22. *Mitchell v Rice*, 132 Ala 120, 31 So 498; *Thomas v Connelly*, 104 NC 342, 10 SE 520; *Allen v Perkins* (Tenn CCA) 45 SW 445.

A clerk of court is not liable for the proceeds from the sale of land in litigation received by him but subsequently paid over to his successor in office, though there was no order by the court requiring or authorizing such payment. *Peeler v Fane* (Tenn CCA) 62 SW 206.

Footnote 23. *Walters-Cates v Wilkinson*, 92 Iowa 129, 60 NW 514; *Dirks v Juel*, 59 Neb 353, 80 NW 1045; *Smith v Patton*, 131 NC 396, 42 SE 849; *Ferrell v Grigsby* (Tenn CCA) 51 SW 114.

Footnote 24. *Sharpe v Connelly*, 105 NC 87, 11 SE 177; *Fort v Assmann*, 38 SC 253, 16 SE 887.

Footnote 25. *Rhea v Brewster*, 130 Iowa 729, 107 NW 940; *Grand Rapids v Krakowski*, 207 Mich 483, 174 NW 201; *Schnur v Hickcox*, 45 Wis 200.

Footnote 26. *Howard v United States*, 184 US 676, 46 L Ed 754, 22 S Ct 543; *Lanham v Dies* (Tex Civ App) 98 SW 897.

Footnote 27. *Sullivan v State*, 121 Ind 342, 23 NE 150.

Footnote 28. *United States v Abeel* (CA5 Tex) 174 F 12; *Hughes v Board of Com'rs*, 50 Okla 410, 150 P 1029, error dismd 243 US 625, 61 L Ed 935, 37 S Ct 400; *State ex rel. Cook v Fidelity & Deposit Co.*, 91 W Va 191, 112 SE 319.

Footnote 29. *Mahaska County v Searle*, 44 Iowa 492; *McDonald v Atkins*, 13 Neb 568, 14 NW 532; *Gilmore v Walker*, 195 NC 460, 142 SE 579, 59 ALR 53.

Footnote 30. *Hurst v Kirby*, 213 Ala 640, 105 So 872; *San Francisco v Mulcrevy*, 15 Cal App 11, 113 P 339, affd 231 US 669, 58 L Ed 425, 34 S Ct 260; *Weisenborn v People*, 58 Ill App 114; *Duluth v Ross*, 140 Minn 161, 167 NW 485; *State use of St. Louis v Thornton*, 8 Mo App 27; *Wilmington v Nutt*, 78 NC 177; *State use of Commissioners of Crawford County v Orr*, 16 Ohio St 522; *Watson v Smith*, 26 Pa 395; *State use of Herald Pub. Co. v Whitworth*, 98 Tenn 263, 39 SW 10; *Scott v Hunt*, 92 Tex 389, 49 SW 210.

Annotation: 59 ALR 74, II(d).

Where the amount of fees which the clerk of a United States district court might retain as compensation for his services is limited by statute to a certain sum, he is liable to the United States on his official bond for fees retained in excess of the amount allowed. *United States v Averill*, 130 US 335, 32 L Ed 977, 9 S Ct 546.

Action to recover on the bond of a clerk of court for failure to pay into the county

treasury fees collected by the clerk in excess of the amount of his salary could not be sustained in the absence of an allegation that the clerk had complied with his statutory duty to make quarterly reports to the county court of the fees collected. State ex rel. Livingston County v Hunt, 347 Mo 1150, 152 SW2d 77.

Footnote 31. § 18, supra.

Footnote 32. Hannah v Hyatt, 170 NC 634, 87 SE 517.

Annotation: 59 ALR 73, 74, II(c).

Footnote 33. Mundell v Wells, 181 Cal 398, 184 P 666, 7 ALR 383.

A clerk of court who, as such, by direction of the court, received Liberty bonds as bail for one in custody of the law could not, where by the conceded facts the action of the court in accepting such bonds as bail could not be said to have been unlawful, be held personally liable for return of the bonds. Kirschbaum v Mayn, 76 Mont 320, 246 P 953, 48 ALR 1425.

Under a Pennsylvania statute providing that when there is no forfeiture of bail and bail is terminated, the clerk, upon order of the court, shall pay the money deposited to the defendant or to the person depositing such money on defendant's behalf, the responsibility for disposition of such funds rests on the court and not the clerk, and the clerk is not personally liable for erroneous payment. Distributive, etc., Workers Union v McKague (DC Pa) 115 F Supp 227, app dismd (CA3 Pa) 216 F2d 153.

§ 31 --Nature of liability

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In some jurisdictions a clerk of court is absolutely liable as an insurer or guarantor for the safekeeping of funds in his custody, 34 and is therefore liable for losses that occur even without his fault. 35 In other jurisdictions the clerk is regarded as a bailee or trustee and is liable only for failure to use ordinary diligence and care, 36 unless such liability is increased by constitutional or statutory requirement. 37

As a bailee the clerk is under an absolute duty to deliver the thing bailed to the proper person, so that his delivery of a fund or a portion thereof to one not the true owner and not authorized to receive it constitutes a conversion, even if the clerk was not negligent and made the mistake by reason of the fraud of an impostor. 38

Footnotes

Footnote 34. Bordy v Smith, 150 Neb 272, 34 NW2d 331, 5 ALR2d 250; Thacker v Fidelity & Deposit Co., 216 NC 135, 4 SE2d 324; Pasquotank County v American Surety Co., 201 NC 325, 160 SE 176.

Footnote 35. Northern P. R. Co. v Owens, 86 Minn 188, 90 NW 371.

Footnote 36. Puckett v Chambers, 66 Ga App 513, 18 SE2d 20, affd 194 Ga 401, 21 SE2d 713; Chandler v Britton, 197 SC 303, 15 SE2d 344; State v McLemore, 162 Tenn 129, 37 SW2d 103.

Footnote 37. Wilson v People, 19 Colo 199, 34 P 944.

Footnote 38. DeLong v Mason, 183 Okla 528, 83 P2d 547; Purcell Bank & Trust Co. v Byars, 66 Okla 70, 167 P 216.

§ 32 --Interest

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Ordinarily a clerk of court is not liable for interest on money paid into court or entrusted to his care if he receives no interest, 39 but where he actually receives interest on the fund he must account for the proper amount. 40 Whether the view of the clerk's liability is that he is a public officer absolutely liable for the funds in his hands, or that he is a trustee or mere bailee of the funds, the ownership of the funds does not pass to him, and he is bound to account for interest which he receives on money coming into his possession by virtue of his office. 41 The right to the interest earned by public funds in the hands of a clerk has been held to be in those ultimately entitled to the fund, and not in the clerk. 42 A clerk may also be held accountable for interest lost by reason of his failure to obey an order of court that money paid into court be deposited at not less than a certain percent. 43

If a clerk of the court makes an unauthorized use of the money entrusted to his care, he or the sureties on his bond may be held liable for interest on the money, from the time of the misappropriation 44 to the time of payment to the person entitled thereto. 45 Moreover, interest may be allowed by way of damages for a clerk's wrongful detention of moneys which should have been turned over to his successor in office. 46

Footnotes

Footnote 39. State ex rel. Ridge v Shoemaker, 278 Mo 138, 212 SW 1; Williams v Hooks, 199 NC 489, 154 SE 828; Harris County v Wilkinson (Tex Civ App) 507 SW2d 848, error ref n r e.

Footnote 40. Bordy v Smith, 150 Neb 272, 34 NW2d 331, 5 ALR2d 250; Williams v Hooks, supra.

Annotation: 59 ALR 71, II.

Footnote 41. Puckett v Walker, 194 Ga 401, 21 SE2d 713; Puckett v Chambers, 66 Ga

App 513, 18 SE2d 20, affd 194 Ga 401, 21 SE2d 713; Rhea v Brewster, 130 Iowa 729, 107 NW 940; Bordy v Smith, 150 Neb 272, 34 NW2d 331, 5 ALR2d 250 (absolute liability jurisdiction).

Annotation: 5 ALR2d 275-277, § 8.

Footnote 42. Rhea v Brewster, 130 Iowa 729, 107 NW 940; Bordy v Smith, 150 Neb 272, 34 NW2d 331, 5 ALR2d 250.

In *United States v Macmillan* (DC Ill) 209 F 266, affd (CA7 Ill) 251 F 55, affd 253 US 195, 64 L Ed 857, 40 S Ct 540, it was held that the federal government had no claim to interest which accrued on a fund paid into court by litigants for the purpose of securing costs, and a clerk receiving but failing to account for such interest was not liable to the government on his official bond. The court pointed out that money collected by the clerk of a federal court for official services rendered was not collected as revenue of the United States, but as fees or emoluments of his office, and belonged to him, subject only to his duty to render an account semi-annually and pay into the treasury any excess over the amount he was allowed by statute to retain.

Interest on money deposited with the clerk of court by a university commencing an eminent domain proceeding, and deposited by the clerk in savings and loan associations, was the property of the university which was entitled thereto upon settlement of the proceeding. A statute providing that state, county, and municipal officers shall account to the state, county, or municipality for interest collected upon deposits by such officers did not evince legislative intent to take interest of the university on funds deposited by the county clerk and vest it in the county. *University of South Carolina v Elliott*, 248 SC 218, 149 SE2d 433.

Footnote 43. *Baltimore & O. R. Co. v Gaulter*, 165 Ill 233, 46 NE 256.

Footnote 44. *McPhillips v McGrath*, 117 Ala 549, 23 So 721; *Marion Trust & Banking Co. v Roberson*, 151 Tenn 108, 268 SW 118.

Footnote 45. *State ex rel. Pool v Ehringhaus*, 30 NC 7.

Annotation: 5 ALR2d 259, 260, § 2.

Footnote 46. *Underwood v Watson*, 223 NC 437, 27 SE2d 144.

§ 33 --Loss resulting from bank failure

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The liability of a clerk of court or the sureties on his official bond for the loss of money paid into court, occasioned by failure of the bank in which the money is deposited by the clerk, is in large measure determined by whether in the particular jurisdiction the clerk's liability is determined by the common-law rule holding him liable as a bailee or whether

absolute liability is imposed. 47 In those jurisdictions in which the liability is that of bailee, the clerk or his sureties are not liable for loss resulting from failure of the bank in which the clerk in the exercise of due care deposited the funds. 48 In other jurisdictions, the clerk and his sureties are held absolutely liable, or liable as insurers, for the loss of funds legally received by the clerk in his official capacity when lost through the failure of a bank in which he deposited them without an order of court, 49 even though the deposit may have been made in good faith. 50

Footnotes

Footnote 47.

Annotation: 59 ALR 69, II(a).

Liability generally of public officer for loss of funds through insolvency of depository, see 63 Am Jur 2d, Public Officers and Employees § 330.

Footnote 48. *Wilson v People*, 19 Colo 199, 34 P 944; *Prudential Ins. Co. v Hart*, 205 Iowa 801, 218 NW 529.

Footnote 49. *Martin v Bogard*, 176 Ark 203, 2 SW2d 700; *Northern P. R. Co. v Owens*, 86 Minn 188, 90 NW 371.

Footnote 50. *Smith v Patton*, 131 NC 396, 42 SE 849.

In *Mordt v Robinson*, 116 Fla 544, 156 So 535, a clerk was relieved of absolute liability with respect to funds coming into his possession and deposited by him in good faith in a bank that failed, by reason of a depository law under which certain named public officers were authorized, though not required, to deposit moneys with banks designated by the comptroller as official depositories.

§ 34 --Funds received illegally or without authority

[View Entire Section](#)
[Go to Parallel Reference Table](#)

As a general rule the sureties on the official bond of a clerk of court are not liable for a loss resulting from the clerk's default with regard to money paid into his hands by virtue of his office, where such money was received by the clerk illegally or without proper authority, 51 except in jurisdictions which ignore the question of authority of the clerk and recognize him as an insurer of funds received by virtue of color of office, 52 in which case it would seem that authorization is immaterial. Another notable exception is that the fees illegally collected are almost universally held to be the property of the state and not of the clerk, and the clerk and his sureties are liable on his bond for any failure to account for them. 53 Moreover, the clerk may be personally liable for money thus received by virtue of his office, though he is not authorized by statute or otherwise to receive it. 54

Footnotes

Footnote 51. People use of Howard v Cobb, 10 Colo App 478, 51 P 523; State ex rel. Arnold v Givan, 45 Ind 267; Davis v National Surety Co., 237 Ky 401, 35 SW2d 560; State use of Baltimore v Norwood, 12 Md 177; United States Fidelity & Guaranty Co. v Young, 127 Miss 725, 90 So 448; State v Moeller, 48 Mo 331; Bantley v Baker, 61 Neb 92, 84 NW 603.

Annotation: 59 ALR 83, III.

Footnote 52. § 31, supra.

Footnote 53. Yuma County v Wisener, 45 Ariz 475, 46 P2d 115, 99 ALR 642.

Annotation: 99 ALR 647.

Footnote 54. People use of Howard v Cobb, 10 Colo App 478, 51 P 523; Hunt v Milligan, 57 Ind 141; Snape v Sanford's Receiver, 3 Ky LR (abstract) 760, 11 Ky Ops 609.

§ 35 Remedies

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The remedies against a clerk of court for his misfeasance or nonfeasance are dependent on the nature of the right of the person complaining and the damage suffered. The party complaining must have suffered injury, actual, implied, or presumed, from an invasion of his rights or from a breach of duty owing him by the offending clerk, although actual or specific damage is not indispensable. 55 One who has suffered injury from a clerk's failure to properly perform a specific duty imposed by law has a cause of action against the officer, founded not on contract, but on breach of duty. 56 Whether the clerk used reasonable care and diligence is necessarily a matter of evidence. 57

Although a court may be empowered by statute to hear and determine a motion against its clerk for failure to pay over moneys collected under the court's process, such remedy is cumulative and does not prohibit the complaining party from filing a suit against the clerk in any court having jurisdiction. 58 An action against the clerk personally for the misappropriation of moneys is ordinarily an action for money had and received, and generally he may be sued personally as any private person is sued. 59

Ordinarily no recovery may be had of moneys paid under a mistake of law, but the payment of illegal compensation to a clerk from public funds under a mistake of law—as where an allowance is made of traveling expenses between the clerk's home and the regular place of holding court, under an erroneous interpretation of a statute—may be recovered from the clerk, such payment being an exception to the general rule. 60

§ 35 ----Remedies [SUPPLEMENT]

Case authorities:

A district judge acted within the scope of his authority in ordering the district clerk to mail the trial docket to attorneys with cases pending before the district court, and properly found the district clerk in contempt for failing to comply with that order. Ex parte Hughes (1988, Tex) 759 SW2d 118, reh overr.

Footnotes

Footnote 55. Eslava v Jones, 83 Ala 139, 3 So 317; McKay v Coolidge, 218 Mass 65, 105 NE 455.

Footnote 56. Selover v Sheardown, 73 Minn 393, 76 NW 50.

Footnote 57. Mallory v Ferguson, 50 Kan 685, 32 P 410.

Footnote 58. Willis v Keator (Tex Civ App) 181 SW 556.

Footnote 59. Hunt v Milligan, 57 Ind 141.

Annotation: 59 ALR 83, III.

Footnote 60. Norfolk County v Cook, 211 Mass 390, 97 NE 778.

§ 36 --Actions on bonds

[View Entire Section](#)
[Go to Parallel Reference Table](#)

An action on the bond of a clerk of court is usually required to be brought in the name of the obligee for the use and benefit of the person injured, 61 unless it is provided that suit may be filed in the name of the individual. 62 Where a bond is not required by statute but is voluntarily given by the clerk, it is enforceable as a voluntary common-law obligation when supported by a valid consideration. 63 And in the case of an official bond, the fact that stipulations are inserted in excess of those required by statute does not render the bond invalid. The surplusage is rejected and the bond sustained. 64 Conversely, the omission of words prescribed for inclusion in the bond may be held not to invalidate it as a statutory bond in particular cases, 65 as where the words are immaterial or cumulative. 66

In an action on a clerk's bond the presumption has been applied that where the clerk fails to pay on demand the moneys received by him, these moneys were misappropriated at the time he received them, and the burden is on the clerk or his sureties to show the contrary.

67 On the basis of the presumption fixing the time of conversion as the time of receipt, nothing else appearing, successive bonds will be held subject to claims for misappropriations made during their respective terms. 68

Footnotes

Footnote 61. *Howard v United States*, 184 US 676, 46 L Ed 754, 22 S Ct 543.

For matters that may give rise to liability on official bond, see §§ 28-34, *supra*.

Practice Aids: –Complaint by administrator de bonis non against clerk and sureties on clerk's bond for misappropriation of moneys paid into court for estate. 5 Am Jur Pl & Pr Forms (Rev Ed), Clerks of Court, Form 1.

Footnote 62. *Ahsmuhs v Bowyer*, 39 Okla 376, 135 P 413.

Footnote 63. *Ahsmuhs v Bowyer*, *supra*; *Commonwealth v Wolbert* (Pa) 6 Binn 292.

Footnote 64. *Milwaukee v United States Fidelity & Guaranty Co.*, 144 Wis 603, 129 NW 786.

Footnote 65.

Annotation: 109 ALR 504, 506, II(b), III.

Footnote 66. Omission of "court" after "circuit" from the conditions of a clerk's bond does not make it other than a statutory bond. *People v Barnwell*, 41 Ill App 617.

The fact that a bond did not contain an express condition for payment of money coming into the clerk's hands by the court's order, to the parties entitled thereto, did not destroy the instrument as a statutory bond. *State ex rel. Courtney v Calloway*, 208 Mo App 447, 237 SW 173 (bond conditioned that principal should faithfully perform duties of office according to law).

Footnote 67. *Gilmore v Walker*, 195 NC 460, 142 SE 579, 59 ALR 53, holding that the sureties might not avoid liability for the clerk's misappropriations within a certain term by reason of any countervailing presumption of prima facie correctness to be accorded the clerk's official report, purporting to show that he had on hand the particular funds at a later date, the report not having substantially complied with the requirements of the statute under which it was rendered.

Footnote 68. *Gilmore v Walker*, *supra*.

§ 37 --Mandamus

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although mandamus will not lie to compel a clerk of court to perform an act requiring the exercise of judgment or discretion, 69 mandamus is generally held to be a proper remedy to compel the clerk to perform a ministerial act, 70 or an act which the law specially enjoins as a duty resulting from the office, 71 such as the filing of papers, 72 the recording of all orders properly endorsed by the judge for entry of record, 73 the searching of records in his custody, 74 the entry of a default judgment when the right is clear and unquestioned, 75 issuance of execution, 76 approval of a bond, 77 and approval of an undertaking on appeal. 78 Payment of money by the clerk of court is also a ministerial act which may be enforced by mandamus unless the clerk has some legal excuse for not doing so. 79 However, a clerk of court cannot be required by mandamus to certify an instrument that does not conform to the records in his office. 80

Where a petition for mandamus involves no independent action of the clerk, but the subject matter at issue is authority exerted by the court in directing the particular action taken by the clerk and complained of by the petitioner, the case may be treated as one against the court. 81

When public records in the custody of a clerk of court are open to public inspection, mandamus is a proper remedy to enforce the right of inspection, 82 and may be issued in favor of one who shows the requisite interest. 83 Ordinarily, the relator or applicant must show that he desires to examine specified records in which he has an interest. 84 Mandamus will not lie where the right to inspect is sought in connection with a book maintained for the convenience of the clerk which does not constitute a court record or paper. 85

§ 37 --Mandamus [SUPPLEMENT]

Case authorities:

Where clerk of court keeps record office open from 8:30 a.m. to noon and from 1 p.m. to 4 p.m., he meets the requirement of RC § 149.43(B) to make public records available during regular business hours. While the restricted hours may inconvenience the county bar, they are regular business hours, and the records are available for inspection; thus, the county bar association fails to state a claim, and the requested complaint for a writ of mandamus is dismissed. *State ex rel. Butler County Bar Assn. v Robb* (1990, Butler Co) 62 Ohio App 3d 298, 575 NE2d 497.

A Court of Appeals judge and an appellant in a medical malpractice action against a doctor were entitled to a writ of mandamus compelling the Court of Appeals clerk to file the judge's dissent to the Court of Appeals' order denying en banc consideration of the malpractice action, where the judge had presented her dissent for filing, and the clerk had refused to file the dissent based upon the Court of Appeals' order that the clerk not file the dissent, because the Court of Appeals had a nondiscretionary duty under RAP 90(e) to allow the judge to file the dissent, and mandamus will issue when there is a legal duty to perform a nondiscretionary act, a demand for performance, and a refusal. *O'Connor v First Court of Appeals* (1992, Tex) 837 SW2d 94.

The seventh motion of a party filed with the clerk of court to extend time for the filing of

a statement of facts was granted where the reporter was unable to prepare such statement of facts due to personal problems and a heavy work load; however, should the court reporter fail to file the statement of facts by a certain date, the court would consider a motion for leave to file a petition for writ of mandamus to compel the court reporter to prepare the statement of facts. *La Chance v McKown* (1981, Tex Civ App 3d Dist) 621 SW2d 660.

Footnotes

Footnote 69. *Pace v Ortiz*, 72 Tex 437, 10 SW 541.

Footnote 70. *State ex rel. Boller v Peffley*, 78 Ohio App 242, 33 Ohio Ops 553, 46 Ohio L Abs 609, 67 NE2d 87; *Universal Transport & Distributing Co. v Cantu* (Tex Civ App) 75 SW2d 697; *Carpenter v Brown*, 118 Vt 148, 102 A2d 331; *Bogges v Buxton*, 67 W Va 679, 69 SE 367.

There must be demand on the clerk to perform a duty; otherwise application for mandamus is premature. *Bernard v Crowell* (Tex Civ App) 38 SW2d 912.

Footnote 71. *Mulford v Davey*, 64 Nev 506, 186 P2d 360, 175 ALR 1255.

Mandamus lies to require the clerk of court to discharge a nondiscretionary legal duty. *Humphrey v Mauzy*, 155 W Va 89, 181 SE2d 329.

Footnote 72. *Burnham v Clerk of First Dist. Court*, 352 Mass 466, 226 NE2d 190 (motion for new trial); *State ex rel. Dawson v Roberts*, 165 Ohio St 341, 59 Ohio Ops 436, 135 NE2d 409 (petition for injunction); *Malinou v McElroy*, 99 RI 277, 207 A2d 44 (petition for administration de bonis non).

Footnote 73. *Humphrey v Mauzy*, 155 W Va 89, 181 SE2d 329.

Footnote 74. *State ex rel. Van Dyke v Scow*, 93 Minn 11, 100 NW 382.

Footnote 75. *Re Grossmayer*, 177 US 48, 44 L Ed 665, 20 S Ct 535; *Utah Ass'n of Credit Men v Bowman*, 38 Utah 326, 113 P 63.

Footnote 76. *Johnson v Boulter*, 237 Ala 325, 186 So 715, 121 ALR 683; *Kruegel v Williams* (Tex Civ App) 153 SW 903, error ref.

But see *State ex rel. Moshner v Wright*, 26 Mont 540, 69 P 101, holding that mandamus will not lie to compel the clerk to issue an order of sale under a foreclosure decree, since there is an adequate remedy by motion in the cause in which the clerk is desired to act.

Where a judgment has been set aside, though wrongfully, by the trial court, it is not the province of the clerk to pass on its action, and he has no authority to issue execution on such judgment. Hence a mandate will not issue to compel him to do so. *State ex rel. Spratlin v Thompson*, 118 Tenn 571, 102 SW 349.

Footnote 77. *Gulick v New*, 14 Ind 93.

Acceptance by the clerk of sureties on a bail bond may be compelled by mandamus where the court has granted bail to a prisoner and directed the recognizance or bond to be taken or executed before the clerk of the court, and the clerk refused to accept the sureties on the sole ground, that liens existed against the real estate owned by the sureties, which admittedly did not render them financially disqualified to discharge the penal sum fixed by the court. *State ex rel. Garbutt v Charnock*, 105 W Va 8, 141 SE 403, 56 ALR 1094.

Footnote 78. *Riesland v Bailey*, 146 Or 574, 31 P2d 183, 92 ALR 1207.

Footnote 79. *State ex rel. Boller v Peffley*, 78 Ohio App 242, 33 Ohio Ops 553, 46 Ohio L Abs 609, 67 NE2d 87, where bail money was attached by defendant's attorney immediately after its release.

Footnote 80. *Touchton v Echols County*, 211 Ga 85, 84 SE2d 81.

Footnote 81. *Ex parte Abdu*, 247 US 27, 62 L Ed 966, 38 S Ct 447.

Footnote 82. *Boylan v Warren*, 39 Kan 301, 18 P 174.

Use of mandamus to enforce right to inspect records, see 52 Am Jur 2d, Mandamus § 204.

Footnote 83.

Annotation: 60 ALR 1360, § II, s. 169 ALR 654, § II.

Mandamus was allowed for the inspection of the records of a case sealed by order of a district court where the relator, though not a party to the original suit, alleged that the records contained evidence valuable to him in other threatened suits. *Ex parte Uppercu*, 239 US 435, 60 L Ed 368, 36 S Ct 140.

Mandamus, not injunction, is the remedy available to an abstract and title guaranty company to compel the county clerk to allow examination of records in his office relating to a specific title which petitioner was employed to examine and guarantee. *Barber v West Jersey Title & Guaranty Co.*, 53 NJ Eq 158, 32 A 222.

Footnote 84. A committee of private citizens and taxpayers who sought to compel the clerk of the superior court to permit examination of public records of his office and in his custody and control, for the stated purpose of procuring general information, failed to state a cause of action. *Booth v Michell*, 179 Ga 522, 176 SE 396.

Footnote 85. *State ex rel. Beckley Newspapers Corp. v Hunter*, 127 W Va 738, 34 SE2d 468.

§ 38 Defenses

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The defenses of a clerk of court in an action for a breach of duty may be in the nature of a denial of the fact of the breach, or a confession and avoidance. He may interpose a defense that the duty was judicial or quasi-judicial and that therefore his execution thereof was privileged; 86 that he was acting under an order of court; 87 that he exercised due care and caution in performing his duty, and that the injury was not the result of his carelessness or negligence; 88 or that the plaintiff's negligence intervened and was the actual cause of the injury. 89 However, contributory negligence has been held not available as a defense to an action on an official bond under some circumstances. 90 Moreover, the negligence of others in the nonperformance of duty does not relieve the clerk of his duty. 91

The time within which an action may be brought against a clerk of court or the sureties on his official bond is governed by statute in the particular jurisdictions. 92 The applicable statute of limitations on an action against a clerk of court does not ordinarily commence to run until the time of commission of the alleged wrongful act. 93 Under certain circumstances, however, the statute begins to run, not at the time of commission of the negligent act, but at the time it becomes certain that there was damage to the plaintiff by reason of the wrongful act. 94 Under other circumstances, the date of expiration of the clerk's term of office may be the time when the statute starts to run. 95 A fraudulent concealment of the cause of action will delay the operation of the statute until after discovery of the fraud. 96

§ 38 ----Defenses [SUPPLEMENT]

Practice Aids: Qualified immunity under 42 USCS § 1983 for public officials, 25 Urb Law 97 (1993).

Applicability of judicial immunity to acts of clerk of court under state law, 34 ALR4th 1186.

Case authorities:

Where clerk had no discretion on whether or not to recall bench warrant after traffic fine had been paid, clerk's error in failing to recall warrant was ministerial in nature, not a judicial function, so defendants were not judicially immune under state statute exempting government entity or employee from liability for damages resulting from judicial function. *Cook v Topeka* (1982) 232 Kan 334, 654 P2d 953, 34 ALR4th 1172.

A clerk of courts who negligently failed to record plaintiff's payment of a traffic fine which resulted in his subsequent arrest and resulting damages had no judicial immunity from an action for damages. *Dalton v Hysell* (1978) 56 Ohio App 2d 109, 10 Ohio Ops 3d 131, 381 NE2d 955.

Footnotes

Footnote 86. Judicial and quasi-judicial duties, § 22, *supra*.

Footnote 87. Davidson v Wiley, Banks & Co., 31 Ala 452 (order of court suspending issuance of execution).

As to liability for acts pursuant to order of court, see § 28, supra.

Footnote 88. §§ 28 et seq., supra.

In an action against a clerk for failure to issue an execution when directed, no defense was raised by a mere statement that the record was lost and that therefore the costs could not be taxed and the execution issued. It must be shown what diligence the clerk exercised in preserving the record, and that the fault or loss could not have been the result of his negligence. McFarland v Burton, 89 Ky 294, 12 SW 336.

Footnote 89. Lane v Beveridge, 135 Or 559, 296 P 872.

Contributory negligence of plaintiff barred recovery in an action on the clerk's bond for failure to issue execution on a judgment for plaintiff, where neither the clerk nor his deputies had actual or constructive knowledge of the necessity for immediate issuance of execution, and plaintiff, who had such knowledge, failed to apprise the clerk of the need for haste. State ex rel. use of St. Louis v Priest, 348 Mo 37, 152 SW2d 109.

Footnote 90. In an action against the sureties on the clerk's bond to recover funds deposited with the clerk pending the outcome of another suit and misappropriated by him, plaintiff's contributory negligence in failing to demand return of the deposit from the clerk at a time when it should have been paid was not a defense, since the suit was on contract, not merely for the tort of the clerk. Aetna Casualty & Surety Co. v State (Tex Civ App) 86 SW2d 826, error dismd w o j.

Footnote 91. Pasquotank County v American Surety Co., 201 NC 325, 160 SE 176.

Footnote 92. Shelby County v Bragg, 135 Mo 291, 36 SW 600; Thurston County v Farley, 128 Neb 756, 260 NW 397; Thacker v Fidelity & Deposit Co., 216 NC 135, 4 SE2d 324; Arnold v Board of Com'rs, 124 Okla 42, 254 P 31.

Footnote 93. A cause of action against a clerk for making an erroneous record in a case, resulting in dismissal of the action instead of entry of judgment, arose when the acts were done, not when the loss was discovered. McKay v Coolidge, 218 Mass 65, 105 NE 455.

Where official funds are not accounted for, if the funds have been converted the statute begins to run at the time of the conversion, but if they are not shown to be converted or misappropriated, there is no wrongful act until demand is made and the clerk refuses to deliver or account for the funds. Gilmore v Walker, 195 NC 460, 142 SE 579, 59 ALR 53.

Failure of clerk to pay upon demand for funds received by virtue or color of his office raises the presumption that the money was misappropriated and converted upon receipt thereof, and the burden is upon him or his surety to show to the contrary. Thacker v Fidelity & Deposit Co., 216 NC 135, 4 SE2d 324.

Footnote 94. Steel & Johnson v Bryant, 49 Iowa 116 (action against clerk for negligently accepting insufficient stay bond; statute did not begin to run until stay expired and right

of action accrued on stay bond).

Footnote 95. *Thacker v Fidelity & Deposit Co.*, 216 NC 135, 4 SE2d 324 (failure of clerk to account for funds received by virtue or color of his office).

The statute of limitations on a cause of action by a judgment creditor or against the clerk of court for failure to properly index a judgment starts to run from the date of expiration of such clerk's term of office, since the clerk's liability in such case is a continuous one, beginning from the day he failed to properly index the judgment and continuing until he ceased to be clerk of court. *Shackelford v Staton*, 117 NC 73, 23 SE 101.

Footnote 96. *Shelby County v Bragg*, 135 Mo 291, 36 SW 600, holding, however, in an action against a clerk of court to recover fees collected in excess of his salary that there was no such concealment as would suspend the operation of the statute.

VII. DEPUTIES AND ASSISTANTS

§ 39 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Two principal classes of aides to public officers are "deputies" and "assistants." The distinction generally made is that an assistant is one who aids, helps, or assists, while a deputy is a person appointed to act for another, a substitute or delegate who acts officially for his principal. 97

A deputy clerk of court in some jurisdictions is considered merely an agent or servant of the principal clerk, rather than as an independent officer of the court, 98 but in others he may be regarded as an independent public officer vested with authority to discharge any of the official duties of his principal. 99 For some purposes a deputy clerk has been considered an officer of the court rather than a state officer, 1 or as a state officer rather than a county officer. 2

§ 39 ----Generally [SUPPLEMENT]

Practice Aids: Are bailiffs too nice? That's one argument about court security arrangements, 107 *Los Angeles Daily J* 130:1 (1994)

Footnotes

Footnote 97. See 63 Am Jur 2d, *Public Officers and Employees* § 483.

Footnote 98. *Beck v Voncannon*, 237 NC 707, 75 SE2d 895.

Statutes authorizing a clerk of court to appoint deputies fix the status of a deputy as agent or servant of the principal clerk, rather than as an independent officer of the court. *Beck v Voncannon*, *supra*.

Footnote 99. *Farmers' Bank v McGavock*, 119 Va 510, 89 SE 949.

Footnote 1. *People ex rel. Fisher v Luxford*, 71 Colo 442, 207 P 477 (deputy clerk as officer of court not subject to civil service provisions applying to state officers).

Footnote 2. *Olmsted v Meahl*, 219 NY 270, 114 NE 393 (special deputy county clerks, as well as county clerk, while serving as clerks of courts, are state officers performing state functions, and are not subject to control by action under Taxpayers' Acts applicable to county officers; but in appointing such special deputy clerks, the county clerk acts as a county officer, and may be subject to suit under such acts).

§ 40 Appointment; eligibility; qualification

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The appointment of deputies and assistants to clerks of courts is generally the subject of statutory provision, 3 some statutes providing for the appointment of deputies or assistants by the clerk of court, 4 or by the clerk upon application to, or approval of, the court, 5 and other statutes providing for appointment by the judge or judges of the particular court in which the deputies or assistants are to serve. 6 Where formal requirements are prescribed by law, they must be followed, 7 but where no manner of appointment is specified by law, an oral appointment may be valid. 8

The legislature may prescribe reasonable qualifications for deputy clerks of court, 9 but in the absence of constitutional or statutory provision to the contrary, a deputy clerk need not be a qualified voter. 10 Even a minor may be eligible for appointment, 11 and even if ineligible, his acts may be valid as those of a de facto officer if he is generally recognized by the public as a deputy. 12

A deputy clerk of court may be required by statute to take the prescribed oath 13 or to give bond. 14

Where the statute providing for the appointment of deputies and assistants is silent as to the term of office, such appointees serve at the pleasure of the appointing official. 15

Footnotes

Footnote 3. For example, under federal statutes the United States Supreme Court is authorized to appoint one or more deputy clerks and further provision is made for appointment by the clerk of the Supreme Court of necessary assistants and messengers

with the approval of the Chief Justice of the United States Supreme Court. (28 USCS § 671(a), (c).) Clerks of the several Courts of Appeals and of the district courts are authorized, with the approval of their respective courts, to appoint necessary deputies and clerical assistants in such number as may be approved by the Director of the Administrative Office of the United States Courts. (See 28 USCS §§ 711(b), 751(b).)

Footnote 4. *Beck v Voncannon*, 237 NC 707, 75 SE2d 895; *Alf v Hunsicker*, 82 Ohio App 197, 37 Ohio Ops 539, 51 Ohio L Abs 50, 80 NE2d 511.

Footnote 5. *State ex rel. Geers v Lasky* (Mo) 449 SW2d 598; *State use of Obion County v Bond*, 157 Tenn 326, 8 SW2d 367.

Footnote 6. *Greenleaf v Woods*, 123 Ky 306, 96 SW 458; *People ex rel. Foley v Unger*, 123 App Div 310, 108 NYS 373.

Footnote 7. *Coleman v Jackson County*, 349 Mo 255, 160 SW2d 691; *People v Sutherland*, 207 NY 22, 100 NE 440.

Footnote 8. *Lucas v Belcher*, 20 Ala App 507, 103 So 909, cert den 212 Ala 597, 103 So 912; *Bonds v State*, 1 Tenn 142.

Footnote 9. *People ex rel. Vanderburg v Brady*, 275 Ill 261, 114 NE 25.

Footnote 10. *Delaney v State*, 48 Tex Crim 594, 90 SW 642.

Footnote 11. *Jarboe v Smith* (Ky) 350 SW2d 490; *Harkreader v State*, 35 Tex Crim 243, 33 SW 117.

It may be noted that certain earlier cases, although holding women incompetent to hold the office of clerk of court, ruled that they could lawfully be appointed and serve as deputy clerks (*Jeffries v Harrington*, 11 Colo 191, 17 P 505; *Warwick v State*, 25 Ohio St 21), and that disqualification based on inability to vote was removed by constitutional suffrage amendments (*Preston v Roberts*, 183 NC 62, 110 SE 586).

Generally, on sex as affecting qualification for office, see 63 Am Jur 2d, Public Officers and Employees § 57.

Footnote 12. *Jarboe v Smith* (Ky) 350 SW2d 490; *Wimberly v Boland*, 72 Miss 241, 16 So 905.

Footnote 13. *Greenleaf v Woods*, 123 Ky 306, 96 SW 458.

Footnote 14. *Moore v McKinley*, 60 Iowa 367, 14 NW 768.

A "Public Employees Faithful Performance Blanket Position Bond," covering all employees in the office of a county clerk and naming the state as the obligee for the benefit and use of the clerk, is not a statutory bond such as may be required by the clerk from his deputy for the clerk's benefit, and is not subject to provisions limiting the amount of the penal sum of the statutory bond. *Fidelity & Casualty Co. v Board of County Comrs.* (Okla) 342 P2d 547.

Footnote 15. *Horstman v Adamson*, 101 Mo App 119, 74 SW 398.

§ 41 Deputy as de jure or de facto officer

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In the absence of proof to the contrary, it will be presumed that a person acting as deputy clerk was a de jure deputy. 16 The regularity of his appointment cannot be collaterally attacked. 17

A regularly appointed deputy clerk who has performed the duties of office and has been recognized as such by the court and the public is a de facto officer, even though he may have failed to take the oath of office properly 18 or though his appointment was not in writing; 19 and his acts are valid, at least so far as the public and third persons are concerned. 20

Footnotes

Footnote 16. *Southern R. Co. v Hundley*, 151 Ala 378, 44 So 195; *Nesbit v People*, 19 Colo 441, 36 P 221.

Footnote 17. *Haskell v Dutton*, 65 Neb 274, 91 NW 395.

Footnote 18. *Lucas v Belcher*, 20 Ala App 507, 103 So 909, cert den 212 Ala 597, 103 So 912; *Calvert, W. & B. V. R. Co. v Driskill*, 31 Tex Civ App 200, 71 SW 997.

Footnote 19. *Haskell v Dutton*, 65 Neb 274, 91 NW 395.

Footnote 20. *Lucas v Belcher*, 20 Ala App 507, 103 So 909, cert den 212 Ala 597, 103 So 912; *Haskell v Dutton*, 65 Neb 274, 91 NW 395.

De facto clerks, § 6, *supra*.

§ 42 Powers and duties

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Except to appoint a deputy, 21 a deputy clerk of court is ordinarily authorized to perform any official or ministerial act which may be done by his principal, 22 and his action is as regular and binding as if performed by his principal. 23 He may, for example, where his principal possesses such authority, make certificates, 24 issue summonses, 25 take acknowledgments, 26 and administer oaths. 27 The judicial powers of a principal clerk

cannot, however, be delegated to his deputy unless the statute so permits. 28

By express statutory authorization, a deputy clerk of a federal court may administer oaths and affirmations, 29 take acknowledgments, 30 and exercise the powers and perform the duties assigned to him by the court. 31 It is also provided by federal statute that on the death of a clerk of court, his deputy or deputies shall exercise the duties of the deceased clerk in his name until his successor is appointed and qualifies. 32

In those jurisdictions where a deputy clerk is recognized as an independent public officer and is endowed by statute with authority to do any act which his principal may do, authority exists in the deputy himself to act alone by operation of law, and since such authority is not derived solely through the principal, it is well executed in the name of the deputy alone without mention of his principal. 33 Where, however, the deputy's authority is derivative and his status is merely that of an agent or servant of the clerk as his principal, he must do all things in the name of the clerk unless the statute expressly provides otherwise. 34

Footnotes

Footnote 21. *Gray v State*, 109 Tex Crim 481, 5 SW2d 518.

Footnote 22. *Erwin v United States* (DC Ga) 37 F 470; *Peninsula Land Co. v Howard*, 149 Fla 786, 6 So 2d 384; *Schott v Youree*, 142 Ill 233, 31 NE 591; *People ex rel. Harris v Lindsay*, 21 App Div 2d 102, 248 NYS2d 691, affd 15 NY2d 751, 257 NYS2d 176, 205 NE2d 312; *Reed v Territory*, 1 Okla Crim 481, 98 P 583; *Rose v Newman*, 26 Tex 131; *Farmers' Bank v McGavock*, 119 Va 510, 89 SE 949.

Footnote 23. *Reed v Territory*, 1 Okla Crim 481, 98 P 583; *Carter v Price* (Tex Civ App) 145 SW2d 291.

Footnote 24. *Schott v Youree*, 142 Ill 233, 31 NE 591.

The powers and duties of the clerk in keeping the records of the court and in certifying and furnishing true copies thereof are ministerial in nature and, therefore, may be performed by a deputy or assistant. *People ex rel. Harris v Lindsay*, 21 App Div 2d 102, 248 NYS2d 691, affd 15 NY2d 751, 257 NYS2d 176, 205 NE2d 312.

Footnote 25. The issuance of a summons is not a judicial act which must be performed personally by the clerk of court; it is a ministerial act which may be performed by a deputy in the name of the clerk. *Beck v Vonnannon*, 237 NC 707, 75 SE2d 895.

Footnote 26. *Rose v Newman*, 26 Tex 131.

Footnote 27. *Gray v State*, 109 Tex Crim 481, 5 SW2d 518.

Footnote 28. *Payton v McQuown*, 97 Ky 757, 31 SW 874 (deputy cannot determine whether injunction should or should not issue, although this may be normal power of his principal); *Farmers' Bank v McGavock*, 119 Va 510, 89 SE 949.

Issuance of a search warrant by an assistant of the clerk of court is the performance of a

judicial function which could not be delegated and is void. *Mount v State*, 45 Ala App 244, 228 So 2d 857.

It is not within the scope of the duties of a deputy clerk of court to inform a party as to whether he will get "fresh" jurors. *United States v Tropeano* (CA1 Mass) 476 F2d 586, cert den 414 US 839, 38 L Ed 2d 75, 94 S Ct 90.

Footnote 29. 28 USCS § 953.

Footnote 30. 28 USCS § 953.

Footnote 31. 28 USCS § 956.

Footnote 32. 28 USCS § 954.

Footnote 33. *Touchard v Crow*, 20 Cal 150; *Wilkerson v Dennison*, 113 Tenn 237, 80 SW 765; *Rose v Newman*, 26 Tex 131; *Farmers' Bank v McGavock*, 119 Va 510, 89 SE 949.

Footnote 34. *Beck v Voncannon*, 237 NC 707, 75 SE2d 895; *Kirby Lumber Co. v Long* (Tex Civ App) 224 SW 906.

§ 43 Liabilities—of deputy

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A deputy clerk of court may be held liable to the clerk for wrongful acts done under color of the clerk's office resulting in the principal clerk's being held responsible in damages. 35 The rule has been applied, for example, where a deputy negligently took an insufficient bond. 36 He may also be held personally liable to a third person for an act of misfeasance or the doing of some positive wrongful act under color of his deputed authority. 37 A distinction may be made, however, where the deputy's liability to a third person is sought to be asserted for mere nonfeasance or refusal to perform an official duty, on the basis that the law does not impose any duty on a deputy as such since it does not recognize him as an officer in his own right. Under this view the clerk alone is responsible for nonfeasance. 38

Footnotes

Footnote 35. *Moore v McKinley*, 60 Iowa 367, 14 NW 768.

Footnote 36. *Snedicor v Davis*, 17 Ala 472 (insufficient writ of error bond); *Moore v McKinley*, 60 Iowa 367, 14 NW 768 (insufficient stay bond).

Footnote 37. *Fidelity & Deposit Co. v Cowan*, 184 Ark 75, 41 SW2d 748.

Where no authority in a principal clerk of a court can be shown, both the principal and his deputy are held liable for tortious acts done by the latter under color of the former's authority. The direct liability of the deputy to the person injured is based on the fact that his act is not justified by any authority in either himself or his principal. Where, therefore, the principal is sued for the tortious acts of the deputy, the plaintiff must show the connection between them, thus establishing the official character of the deputy, and, by the same proof, the principal's responsibility, but where the deputy himself is sued, the plaintiff need show no more than the act of trespass, which constitutes a complete case, unless the deputy shows lawful authority. *Coltraine v McCain*, 14 NC 308 (deputy issuing execution directing levy on property for costs of action, in case wherein present plaintiff was unsuccessful party, held liable for erroneously including both parties' costs, the sheriff having levied on and sold certain of plaintiff's property and having applied proceeds to discharge of execution).

Footnote 38. *Coltraine v McCain*, *supra*.

See also 63 Am Jur 2d, Public Officers and Employees § 489, pointing out that if a deputy or assistant has the status of a public officer, it logically follows that he is liable not only for wrongful acts done under the color of his office, but also for his neglect or refusal to perform an official duty.

Failure of deputy clerk of district court to record or note in the docket the district court judge's suggestion that the case might be called for trial the following week did not make the clerk liable for costs and attorney's fees expended by plaintiff in restoring the case to the trial calendar. *United States use of Somers v Winscott* (CA7 Ill) 238 F2d 519.

§ 44 --Of clerk for acts of deputy or assistant

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Pursuant to the rule governing public officers generally, 39 a clerk of court is not ordinarily liable for the wrongful acts of his assistants or subordinates. 40 This rule has been given particular application where the subordinates are in a sense officers themselves as distinguished from servants of the clerk. 41 But there are a number of exceptions and qualifications. 42 One important qualification arises where the subordinate occupies the status of "deputy." Under this principle, applied to clerks of court, the clerk is responsible for the deputy's official act, because the act of the deputy, by color of his principal's authority, is that of the principal himself, 43 who must take care to employ no person who will abuse his authority. 44 Although some authorities hold that a clerk may not be held liable where the misconduct arises out of or involves some act which is not within the ordinary duties of the deputy, 45 attempts to exonerate the clerk on this theory sometimes fail. 46

Despite the general principle of nonliability, liability of a clerk of court in a particular case for acts of a deputy or assistant may result from the language of legislation relating to the terms of official bonds or to the duties of particular officers, from the language of such a bond itself, or from both. 47 Thus, although it is conceded in a particular case

that a clerk and his sureties are not responsible under common-law principles of tort and agency for the wrongful acts of deputies who are themselves public officers and not under the superior's unrestricted control or right of hiring and discharging, 48 a clerk of court nevertheless is liable on his bond for the acts of a deputy where the controlling statute provides that every official bond is obligatory on the principal and sureties for any breach of condition, whether committed or suffered by the principal officer, or his deputy or clerk. 49

The liability, if any, of the clerk for acts performed by his subordinates in the course of their employment is of a civil nature; he cannot ordinarily be held criminally accountable for wrongful acts in which he has not taken part. 50

Footnotes

Footnote 39. See 63 Am Jur 2d, Public Officers and Employees § 295.

Footnote 40. *Spaniol Ford, Inc. v Froggatt* (Wyo) 478 P2d 598.

Annotation: 71 ALR2d 1142, § 2.

Footnote 41. A prothonotary's exercise of control in the assignment of duties to and the supervision of subordinates does not, under the rule of respondeat superior, render the prothonotary liable for the negligence of such subordinates in the performance of their duties, since the employees in the prothonotary's office are not employed in his private affairs but are public servants employed and paid by the county for the performance of public affairs of the county. *Commonwealth use of Orris v Roberts*, 392 Pa 572, 141 A2d 393, 71 ALR2d 1124.

See also *Union Bank & Trust Co. v Los Angeles County*, 11 Cal 2d 675, 81 P2d 919, recognizing the principle of nonliability for acts of subordinates as applicable to deputy clerks holding offices created by charter adopted pursuant to constitutional authority, and serving under civil service regulations.

Footnote 42.

Annotation: 71 ALR2d 1142, § 2 (statutes expressly imposing liability; negligence on officer's part in appointing or supervising assistant; status of assistant as employee of officer rather than as public servant; personal direction of or co-operation in wrongful act by officer himself; and wrongdoing involving loss of public funds).

Footnote 43. *Commonwealth use of Green v Johnson*, 123 Ky 437, 96 SW 801; *Fisher v Levy*, 180 La 195, 156 So 220, 94 ALR 1297; *Duluth v Ross*, 140 Minn 161, 167 NW 485; *Hartwell v Riley*, 47 App Div 154, 62 NYS 317; *Coltraine v McCain*, 14 NC 308.

Footnote 44. *Coltraine v McCain*, *supra*.

See 63 Am Jur 2d, Public Officers and Employees § 490.

Footnote 45. *Whyte v Mills*, 64 Miss 158, 8 So 171; *Stuart v Madison*, 5 Va 481.

Annotation: 71 ALR2d 1146, § 4[b].

Footnote 46.

Annotation: 71 ALR2d 1147, § 4[b].

A complaint on a municipal court clerk's bond charging misappropriation by a deputy of moneys turned over to him as fines, fees, penalties, and the like, was characterized in *Duluth v Ross*, 140 Minn 161, 167 NW 485, as alleging malfeasance in performance of the deputy's official duties, the court observing: "Of course, stealing the money was not an official duty of the deputy; but this is not the guide. It was his duty to receive and account for the money, and he failed in this duty."

Footnote 47. *Union Bank & Trust Co. v County of Los Angeles*, 11 Cal 2d 675, 81 P2d 919; *Hilboldt v Caraker*, 41 Ill App 595; *Brigham v Bussey*, 26 La Ann 676; *Silver Bow County v Davies*, 40 Mont 418, 107 P 81.

Annotation: 71 ALR2d 1147, § 5.

Under a statute making the clerk of the municipal court responsible for the general conduct of the business of his office and for the faithful discharge of the duties of the deputy and assistant clerks, the clerk was liable for loss of funds resulting from embezzlement by an assistant. *Bird v McGoldrick*, 277 NY 492, 14 NE2d 805, 116 ALR 1059.

Footnote 48. *Union Bank & Trust Co. v Los Angeles County*, 11 Cal 2d 675, 81 P2d 919, stating that under these circumstances in the absence of statute, the modern view is opposed to making public officers civilly liable for torts of deputies, and that deputy clerks holding offices created by charter adopted pursuant to constitutional authority, and serving under civil service regulations, are independent statutory officers.

Footnote 49. *Union Bank & Trust Co. v Los Angeles County*, *supra*.

Footnote 50. See *People v Gill*, 30 Ill App 2d 32, 173 NE2d 568, stating that the common-law rule under which a clerk is not responsible for the criminal offenses of his deputies is not altered by a statutory declaration that the principal clerk shall "in all cases" be responsible for the acts of his deputies; such provision is construed as making the clerk civilly responsible for the acts of his deputies, but not as creating indirect criminal liability.

§ 45 --Of surety

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Unless special language appears in the official bond, the liability of the sureties of a clerk of court for misconduct of his subordinates depends on the liability of the officer himself; a surety on the clerk's bond is liable for the act of a deputy only if the clerk is liable. 51 It has been held that a condition of the clerk's bond that the principal would faithfully perform all the duties of his office was broad enough to include faithful performance by a

deputy. 52

In a few instances the question of liability of sureties for misconduct of an assistant or subordinate has been, because of particular language in a controlling statute or in the officer's bond, treated as distinct from the question of the liability of the officer himself.

53

Footnotes

Footnote 51. *Duluth v Ross*, 140 Minn 161, 167 NW 485.

Annotation: 71 ALR2d 1149, § 7.

Footnote 52. *Duluth v Ross*, *supra*.

Footnote 53.

Annotation: 71 ALR2d 1150, § 7.

That a prothonotary's bond provides for faithful performance of duties by his deputies, clerks, assistants, and appointees does not render the prothonotary and his surety liable on the bond to a judgment creditor damaged by the failure of the prothonotary's clerk to index a judgment properly, where the bond merely provides for actions for the use of the county, the state, and such other party or parties for whom the prothonotary shall collect or receive money. *Commonwealth use of Orris v Roberts*, 392 Pa 572, 141 A2d 393, 71 ALR2d 1124.